JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY

BY

JOHN MACDONELL, Esq., C.B., LL.D.

AND

EDWARD MANSON, Esq.

'Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

New Series. 1900. No. 2.

LONDON:

JOHN MURRAY, ALBEMARLE STREET.

1900.

[*All rights reserved.*]

PRINTED BY
HAZELL, WATSON, AND VINEY, LD.,
LONDON AND AYLESBURY.

CONTENTS OF No. 2, 1900.

PAGES

1. THE RT. HON. LORD RUSSELL OF KILLOWEN, G.C.M.G., PRESIDENT OF THE SOCIETY OF COMPARATIVE LEGISLATION (PORTRAIT) . . . . . *Frontispiece*

2. COUNCIL AND EXECUTIVE COMMITTEE OF THE SOCIETY . . 198–200

3. STATUS IN CONNECTION WITH COLONIAL MARRIAGES . . 201–204
   BY THE RIGHT HON. LORD DAVEY.

4. DISCIPLINARY JURISDICTION OVER SOLICITORS . . . 205–213
   BY HENRY EDWARD GRIBBLE, ESQ.

5. THE SUPPORT OF WAR BY WAR 214–223
   BY JOHN S. RISLEY, ESQ.

6. THE WEST INDIES AND CONFEDERATION 224–232
   BY WALWYN P. B. SHEPHEARD, ESQ., M.A.

7. THE LAW OF SOUTH AFRICA 233–239
   BY W. F. CRAIES, ESQ.

8. APPEALS UNDER THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 240–250
   BY ARTHUR R. BUTTERWORTH, ESQ.

9. COMPARATIVE LEGISLATION IN BANKRUPTCY 251–270
   BY PROFESSOR RICHARD BROWN.

10. MODERN DEVELOPMENTS OF MOHAMMEDAN LAW . . . 271–275
    BY SIR RAYMOND WEST, K.C.I.E.

11. THE SOURCES OF THE LAWS OF THE COLONIES . . . 276–283
    BY W. HARRISON MOORE, ESQ.

12. MODES OF LEGISLATION IN THE BRITISH EMPIRE: NEWFOUNDLAND 284–288
    BY SIR J. S. WINTER, K.C M.G.

PAGES

13. RECENT LEGISLATION AS TO INEBRIATES IN ENGLAND AND THE COLONIES 289–293
By ERNEST M. POLLOCK, ESQ., AND A. M. LATTER, ESQ.

14. PRELIMINARY EXAMINATION OF PATENTS AND COMPULSORY LICENCES 294–318
By A. WOOD RENTON, ESQ.

15. NOBILITY IN ENGLAND 319–325
By EDWARD MANSON, ESQ.

16. THE SEIZURE OF THE *MASHONA* 326–341

17. THE NEW COMMERCIAL CODE OF GERMANY 342–347
By G. H. B. KENRICK, ESQ., LL.D.

18. CLASSIFICATION OF CRIMES IN MODERN CODES . . . 348–354

19. SOME NOTES ON FOREIGN COMPANIES IN ENGLAND . . 355–358
By ISRAEL DAVIS, ESQ.

20. NON-CHRISTIAN MARRIAGE 359–387
By SIR DENNIS FITZPATRICK, K.C.S.I.

21. NOTES 388–405
Hostilities without War 388
Egyptian Companies 389
The Law of Nature 390
The Summary Punishment of Perjury in Gambia 391
Married Women's Property in Babylon 392
Animals and their Rights 393
Mining Leases and Subterranean Dragons in China . . . 394
The Revision of Case Law in America 394
Railway Companies and Negligence 394
Hong Kong and the "Bully" 395
Codification of the Commercial Law of the Empire . . . 395
Trusts in the United States 397
What is Neutrality? 397
The Historical School of Jurisprudence 398
Adoption in Indian Law 398
Pensions and the Doctrine of "Ultra Vires" 399
Englishwomen and Mohammedan Marriages 399
Law and Public Opinion 400
Heroic Social Remedies 401
Customs among the Jains 401
Reciprocity of Matrimonial Obligations 402
Medical Practice and the Sale of Quack Medicines . . . 402
Judicial Statistics and the Colonies 403
The Congress of Comparative Law at Paris 404

THE SOCIETY OF COMPARATIVE LEGISLATION.

PRESIDENT:

THE RT. HON. LORD RUSSELL OF KILLOWEN, LORD CHIEF JUSTICE OF ENGLAND, G.C.M.G.

COUNCIL:

The Rt. Hon. Lord Alverstone, Master of the Rolls.
Sir W. R. Anson, Bart., M.P., Warden of All Souls' College, Oxford.
The Rt. Hon. the Duke of Argyll, K.T., G.C.M.G.
The Rt. Hon. Lord Ashbourne, Lord Chancellor of Ireland.
The Rt. Hon. H. H. Asquith, Q.C., M.P.
Thomas Barclay, Esq.
H. C. Beeton, Esq., Agent-General for British Columbia.
The Hon. E. Blake, Q.C., M.P.
The Rt. Hon. James Bryce, M.P.
The Rt. Hon. Earl Carrington, G.C.M.G.
The Hon. Sir J. W. Carrington, Chief Justice Supreme Court of Hong-Kong.
M. D. Chalmers, Esq., C.S.I., Assistant Parliamentary Counsel to the Treasury.
His Excellency the Hon. J. Choate, United States Ambassador at the Court of St. James's.
Arthur Cohen, Esq., Q.C.
Baron de Courcel, formerly French Ambassador at the Court of St. James's.
H. Bertram Cox, Esq., Legal Assistant Under Secretary, Colonial Office.
The Rt. Hon. Viscount Cross, G.C.B., G.C.S.I.
The Rt. Hon. Lord Davey.
W. E. Davidson, Esq., C.B., Q.C., Legal Adviser to the Foreign Office.
The Rt. Hon. the Earl of Derby, K.G., G.C.B.
A. V. Dicey, Esq., Q.C., Vinerian Professor of English Law, Oxford.
The Rt. Hon. the Marquis of Dufferin and Ava, G.C.B., K.P.
Sir R. B. Finlay, Q.C., Attorney-General.
C. J. Follett, Esq., C.B., Solicitor to the Commissioners of Customs.
The Rt. Hon. Sir Edward Fry, formerly Lord Justice of Appeal.
Sir James Garrick, K.C.M.G., formerly Agent-General for Queensland.
The Hon. Duncan Gillies, formerly Agent-General for Victoria.

R. B. Haldane, Esq., Q.C., M.P.
The Rt. Hon. the Earl of Halsbury, the Lord Chancellor.
Sir Robert Herbert, G.C.B., formerly Permanent Under Secretary of State for the Colonies.
The Rt. Hon. Lord Hobhouse, K.C.S.I.
Professor T. E. Holland, Professor of International Law, Oxford.
Sir Courtenay Ilbert, K.C.S.I., Parliamentary Counsel to the Treasury.
A. Taylor Innes, Esq.
The Rt. Hon. Lord James of Hereford.
Professor Jenks, Reader in English Law, University of Oxford.
The Hon. Mr. Justice Kennedy.
Courtney Kenny, Esq., LL.D.
The Rt. Hon. Viscount Knutsford, G.C.M.G.
The Hon. Chandos Leigh, C.B., Q.C., Counsel to the Speaker.
The Rt. Hon. Lord Lindley, Lord of Appeal.
Lord Lingen, K.C.B.
John Macdonell, Esq., C.B., LL.D., Master of the Supreme Court.
Sir K. Muir Mackenzie, K.C.B., Q.C., Permanent Secretary to the Lord Chancellor.
Professor F. W. Maitland, LL.D., D.C.L., Downing Professor of Law, Cambridge.
The Hon. Mr. Justice Mathew.
The Rt. Hon. the Earl of Morley, Chairman of Committees, House of Lords.
Sir Francis Mowatt, K.C.B., Permanent Secretary to the Treasury.
The Rt. Hon. Viscount Peel, late Speaker of the House of Commons.
Sir Westby Perceval, K.C.M.G., Agent-General for Tasmania.
T. D. Pigott, Esq., C.B., Controller of the Stationery Office.
Sir Frederick Pollock, Bart., Corpus Professor of Comparative Jurisprudence, Oxford.
T. Raleigh, Esq., Legal Member of the Council of the Viceroy of India.
Lord Reay, G.C.S.I., formerly Under Secretary of State for India.
Sir Robert Reid, G.C.M.G., Q.C., M.P.
The Rt. Hon. Cecil Rhodes, formerly Prime Minister of Cape Colony.
The Rt. Hon. the Earl of Rosebery, K.G., K.T.
Professor Henry Sidgwick, Professor of Moral Philosophy, Cambridge.
Whitley Stokes, Esq., C.S.I., formerly Legal Member of the Council of the Viceroy of India.
Sir Charles Tupper, Bart., G.C.M.G., formerly High Commissioner for Canada.
Lord Welby, G.C.B.
Sir Raymond West, K.C.I.E.
Professor Westlake, Q.C., Professor of International Law, Cambridge.
E. H. Whittuck, Esq.
Sir Arthur Wilson, K.C.I.E., Legal Adviser to the India Office.
H. F. Wilson, Esq., Legal Assistant, Colonial Office.
The Hon. Mr. Justice Wright.
Sir Henry Wrixon, K.C.M.G.

EXECUTIVE COMMITTEE:

The Lord Chief Justice of England (Lord Russell of Killowen, G.C.M.G.), *Chairman.*
Thomas Barclay, Esq.
The Hon. E. Blake, Q.C., M.P.
The Rt. Hon. James Bryce, M.P.
Mackenzie Dalzell Chalmers, Esq., C.S.I.
Arthur Cohen, Esq., Q.C.
H. Bertram Cox, Esq.
W. F. Craies, Esq.
Newton Crane, Esq.
The Rt. Hon. Lord Davey.
W. E. Davidson, Esq., C.B., Q.C.
Sir James Garrick, K.C.M.G.
Albert Gray, Esq.
John Hunter, Esq.
Sir Courtenay Ilbert, K.C.S.I.
The Rt. Hon. Lord James of Hereford.
John Macdonell, Esq., C.B., LL.D.
Sir Kenneth Muir Mackenzie, K.C.B., Q.C.
Professor F. W. Maitland, LL.D., D.C.L.
J. A. Simon, Esq.
Whitley Stokes, Esq., C.S.I.
Sir Charles Tupper, Bart., G.C.M.G.
Lord Welby, G.C.B.
Sir Raymond West, K.C.I.E.
Professor Westlake, Q.C.
H. F. Wilson, Esq.

HONORARY SECRETARY:

EDWARD MANSON, ESQ., 8, Old Square, Lincoln's Inn.

EDITORS OF THE JOURNAL:

JOHN MACDONELL, ESQ., C.B., LL.D.
EDWARD MANSON, ESQ.

STATUS IN CONNECTION WITH COLONIAL MARRIAGES.

[*Contributed by the* Rt. Hon. Lord Davey.]

Objects of the Recent Bill.—The Colonial Marriages Bill introduced by Lord Strathcona was, on May 29 last, read a second time in the House of Lords, and has since passed through Committee and been read a third time. There was a division on the second reading and a large majority in favour of the Bill. The object of the Bill is to give validity for all purposes to marriages by a man with his deceased wife's sister contracted in a colony the law of which permits such marriages, and when both parties are domiciled in the colony.

The Bill raises questions of some legal interest, which were sure to arise when the Colonies acquired the right to make their own laws, as to status, marriage and legitimacy. What is the legal status in this country of the wife and offspring of such a marriage? It cannot, in the opinion of the present writer, be denied that the wife has the status of a wife for all purposes, except, possibly, that of a right to dower from real estate in England. The case of *Ilderton* v. *Ilderton* (2 H. Bl. 145) is an apparent decision in favour of her right to dower, but in that case the question seems to have been only as to a Scotch marriage between persons not incapable of marriage in England. It is now well established that *quoad solemnitates* the law of the place of the marriage governs, but as regards the capacity to contract the law of the domicile prevails. There is no actual decision on the point, but it is conceived that a woman who was incapable of contracting the marriage by the law of England, could not claim dower as widow of her deceased husband. It is thought that the *lex rei sitæ* would be held to prevail.

Succession to Personal Estate.—As to the children, also, they are legitimate for all purposes of succession to personal estate *ab intestato*, or under the description of children of their father or mother in a will. This was generally accepted in the course of the debate in the House of Lords; and as regards the succession to the personal estate of their own parents, there has never, so far as the writer knows, been any dispute. But there has been great difference of opinion, whether a person legitimate according to the law of

his parents' domicile could succeed as the child of his parents to the personal estate of one dying domiciled in England either under a will or an intestacy. In *Boyes* v. *Bedale* (1 H. and M. 798) Lord Hatherley held that the son of a man domiciled in France, who was born before the marriage of his parents, and legitimated by their subsequent marriage, could not succeed to personal estate under the description of child of his father in the will of an English testator. The Vice-Chancellor decided the case on the ground that it was a question of construction, and a legacy to a child of A must be taken to mean a child in the sense in which the law of England understands the term, or (in other words) one who would be the child of the person in question if that person had been domiciled in England. The Vice-Chancellor expressed an opinion that the language of the Statute of Distributions would be dealt with in the same manner. In *Goodman's Trusts* (14 Ch. D. 619) Sir George Jessel held that "children" in the Statute of Distribution does not include children who, though legitimate according to the law of their parents' domicile, are illegitimate according to English Law. The decision, like that of Lord Hatherley, related to an *ante-natus* legitimated by subsequent marriage of his parents, but the reasoning in both judgments would apply equally to the offspring of marriage with a deceased wife's sister. The broad ground taken was that the claimants in each case were not *ex justis nuptiis procreati.* Sir George Jessel's decision was overruled in the Court of Appeal (17 Ch. D. 266) by Lord Justices James and Cotton, Lord Justice Lush dissenting, and there have been subsequent decisions, such as that by Mr. Justice Kay, in *In re Andros* (24 Ch. D. 637), and by Mr. Justice Stirling and the Court of Appeal in *In re Grove* (40 Ch. D. 216). The question may now, therefore, be considered as settled. The decisions of Lord Hatherley and Sir George Jessel appear to the present writer to have been entirely contrary to the accepted principles of private International Law and clearly erroneous. Admitting that the question was one of construction of the words "child" or "children," the answer should have been that the English Law recognises as the legitimate child of a person one who has acquired that status according to the law of his parent's domicile. To require that he should also fulfil the conditions which would be required if his parent were domiciled in England, has no foundation either in legal principle or common sense.

Succession to Real Estate.—With regard to real estate the case is different. Ever since *Birtwhistle* v. *Vardill* (7 Cl. & F. 895) it must be taken to be the law of England that, in order to establish a title to real estate by descent, the claimant must predicate of himself that he is the legitimate issue of a marriage which would have been valid if made between domiciled Englishmen. As Chief Justice Tindal said, this rule of descent is a rule of positive law annexed to the land itself, and must prevail even if it be at variance with the ordinary rule of International Law. The late Lord Esher expressed a doubt whether the rule applied to the child of a marriage with

a deceased wife's sister, when such a marriage was lawful by the law of the domicile. But, in the opinion of the writer, there is no room for such a doubt. The principle on which the descent of a legitimated *ante-natus* was declared contrary to English Law would equally apply to the issue of a marriage between persons who by English Law were incapable of marrying, and it is impossible to read the judgments in the House of Lords in the Scotch case of *Fenton* v. *Livingstone* (3 Macq. 467) without seeing what the decision in a similar case in England would be. But this rule only applies to descent, and it does not follow that if real estate be given to one by will or deed, as child of A, the person who had the status of a legitimate child of A might not take. That question was answered in favour of the claimant by Mr. Justice Stirling in *Grey's Trusts* (1892, 3 Ch. 88), which again was a case of an *ante-natus* legitimated by subsequent marriage. The writer thinks the decision right, and one that would be followed. The same principle would of course apply to the children of the marriages under discussion. If this be the correct view of the law, the son of one of these marriages might succeed under a will or settlement as tenant in tail by purchase by the description of son of his father, but could not succeed as heir in tail by descent from his father if the latter were the purchaser (in the legal sense) or proprietor.

Anomalousness of the Present Law.—The question may well occur to many minds whether it is worth while maintaining these fine distinctions, and whether any object whatever is gained by doing so? The people who are affected by this state of the law are, it must be remembered, our own sons, daughters, brothers, sisters, nephews and nieces. It is not an uncommon case for a younger son of a great family to emigrate, and by unexpected deaths without issue, find himself entitled to the family honours and estate. If he has contracted one of these marriages he cannot transmit them to his son. Or, if he is dead when the succession would have opened to him his son cannot succeed in his place. Again, a returned colonist buys an estate "at home"—and dies suddenly without having made his will—as any man may. A collateral relation steps into the estate in exclusion of his children. On the other hand, leaseholds of whatever length of term are personal estate, and may be taken by the children. A humorous illustration of the anomalies of the law was given in the course of the debate on second reading. A man, it was said, may have a leasehold house for a long term and a freehold stable adjoining. His son is legitimate in the house and a bastard in the stable. What is the object, one repeats, of maintaining such anomalies in the law? Who is benefited by their maintenance, or who will be injured by their repeal? You may be opposed to marriages with a deceased wife's sister, but if the colonists are entrusted with plenary powers of legislation, that is for them to decide. There was considerable force in the Lord Chancellor's suggestion, that the Bill was really one to alter the law of inheritance in this country. Maybe it would

be more logical and better to pass a law of general application for that purpose, but in the meantime, and until the Government of this country think fit to do so, one does not see why the colonists should not sue for the remedy of their particular grievance because it is part of a larger general question. The grievance is none the less real because to a large extent it may be sentimental.

DISCIPLINARY JURISDICTION OVER SOLICITORS.

[*Contributed by* HENRY EDWARD GRIBBLE, ESQ.]

Influential Position of the Solicitor.—Both the status of solicitors and the influence incident to their practice make expedient a special disciplinary jurisdiction over the members of the profession. They are, as representing the old order of attorneys, officers of the High Court of Justice, and the only persons entrusted with the duty and privilege of appearing for suitors in that Court and in the subordinate Courts of Justice, civil and criminal, throughout the country; while the voluminous and intricate provisions of Common and Statute Law, bearing upon almost every transaction of magnitude affecting the rights of person or property in this densely populated and wealthy community, necessitate constant reference to their experience and knowledge, and give them a unique, an almost unrivalled, influence. That this influence is as a rule exercised by solicitors for the sole good of their clients, is due mainly to the very high feeling of professional honour which prevails among them; but it is watched, and properly watched, by the State with a certain jealousy. Hence their capability and qualification for acting as solicitors is rigidly tested, the conditions of their practice are carefully regulated, and their right to practise the profession is revoked on any deflection from the strictest course of integrity.

Different Kinds of Control: Law Societies and the High Court.—From very early times this discipline has been exercised in a twofold manner: first by the Courts of Law, and, secondly, by voluntary associations among solicitors themselves, much on the lines of the old City Companies.

The power of these associations is, in the present day at all events, moral and social; the penal power rests entirely with the Courts of Law. But the two are much mixed up. For instance, the Courts admit solicitors to the roll, which gives them the right of practising their profession; but as a preliminary they require the qualifications of candidates to be tested by examinations conducted by the Incorporated Law Society. After admission, an annual certificate must be taken out, which is as a rule granted as a matter of course, but may, under certain circumstances, be refused; the Society, as the registrar of the roll, considers such

circumstances, and may decline to issue a certificate, when the solicitor (for, being on the roll, he is still a solicitor, although he may not practise his profession without a certificate) may appeal to the Master of the Rolls, who decides whether the certificate may issue. Orders regulating the charges of solicitors for conveyancing work are settled from time to time by certain of the Judges, but in combination with the President of the Society and the President of a country Law Society; and, lastly, complaints against solicitors are dealt with by the High Court; but the application of the complainant may be, and as a matter of practice invariably is, addressed to the Society, and examined into and reported on by a committee of the Council of the Society.

Thus the High Court is the only body possessing actual jurisdiction over solicitors. Voluntary associations, as the Incorporated or other Law Societies, can express opinions and admonish members, or remove them from membership, but cannot deprive them of their right to practise their profession.

The power of the Law Societies is salutary, and tends strongly to preserve the high tone which animates the profession, but the final sentence on evil-doers is most properly reserved for a Court of Justice, as the only body which should be entrusted with the power of depriving a man of the means of earning his livelihood and of depriving his *clientèle* of his services. I call attention to this particularly, because a superficial knowledge of the position causes some persons to throw on the Law Societies a burden of responsibility in regard to evil-doers for which there is no real foundation.

Division of Subject.—I propose to refer to attorneys as officers of the Law Courts, next to trace the origin and present conditions and functions of the Law Society, and, lastly, to allude to the causes which conduce mainly to such complaints as usually arise against a few of my brother-practitioners, and especially to the recent unhappy scandals.

Solicitors as Officers of the Court.—The first Statute regarding attorneys was passed in the year 20 Henry III., when it was provided that any person who was a suitor might appoint an attorney to conduct his case. Those attorneys became officers of the Court in which they appeared. From that time Statutes have been continually passed regulating the right to practise or confirm the admission of attorneys, and for regulating their practice and conduct throughout their career. The name "solicitors" was originally applied to those who superintended the general business affairs of their clients, but attorneys who won their clients' confidence by the conduct of their litigation rapidly acquired their confidence also in other matters, and were consulted in dealings with property of all kinds, and became known by both names; in fact, even at the present day there is no better introduction to good business than to establish a reputation for the successful conduct of litigation.

Gradually the more modern term of "solicitor" supplanted that of

"attorney" until, by the Judicature Act of 1873, the latter term was superseded. The profession appears to have been open to any competent person until the Act 4 Henry IV., chap. 18, which recites that "sundry damages had ensued to persons by the great number of attorneys ignorant of the law, and not learned as they were wont to be," and provides that attorneys should be examined by the Judge, and that they that were good and virtuous, and of good fame, might be received and sworn to serve well and truly in their office, and their names placed on the roll. This is the first record of any examination, and it appears to have dealt rather with the moral than the legal training of applicants. Certain functions have at different times been given to bodies of solicitors by which some amount of control has been either voluntarily or by Statute exercised over them, and these will be dealt with later; but it must be borne in mind that the Courts, and the Courts only, are the tribunals which have the right of giving admission to the roll, and of allowing members to continue on the roll. In regard to their practice, the Courts have always assumed the right of regulating their charges. The earliest Statute regulating these is the Statute 3 James I., chap. 7. And, *à propos* of this subject, while it is conceded that some regulations are necessary, a system which puts the experienced solicitor on a par with the most youthful is ludicrous. If Lord Davey had been during his last years at the Bar entitled to receive no higher fees than the white-wigged novice just called, the absurdity would not be greater than it is in our profession, where a solicitor of recent admission is entitled to and obtains the same fees as the most experienced practitioner. Of course the matter rights itself by the client paying additional charges proportionate to the importance of his case and the skill employed; and the impossibility of framing any scale applicable to all cases is one of the causes of the difference often talked of between party and party and solicitor and client costs.

Jurisdiction of the Court over its Officers.—The jurisdiction of the Court in regulating the conduct of its officers may of course be exercised at any time, and includes the right of settling the scale of fees to be taken in litigious matters and framing regulations for carrying on litigation; but the most important exercise of this jurisdiction is the regulating of the roll by striking off or suspending such solicitors as misconduct themselves. The details of this operation are dealt with below. It is sufficient to say here that, while I have never heard of undue severity being attributed to the Court, there have frequently been cases in which an unexplained leniency is shown. That a piece of unprofessional conduct on the part of a young solicitor, occasioned by excess of zeal for his client, is sometimes sufficiently dealt with by strictures passed on him by eminent Judges is obvious; but the profession have sometimes noted with regret that men abusing their situation and guilty of dishonest or dishonourable acts, perpetrated for their own benefit, have been allowed to remain on the rolls,

*

and merely suspended from practice for a time. Such cases are rare, but do occur, and can be attributed only to some wave of leniency, the origin of which is not shown in the reports of the cases.

The Incorporated Law Society.—The detail working of this penal discipline is entrusted to the Incorporated Law Society, which is an association incorporated in 1831, and including in its members now about fifty per cent. of the profession. Its original object does not appear to have been in any way connected with functions of discipline; but besides the statutory powers entrusted to it, the influence of such a body—to which practically all the most eminent metropolitan and a very large number of country practitioners belong—is of course very extensive. Its influence is extended beyond its members by the country Law Societies formed in most counties and in all large business centres, and working with the main Society.

Early Efforts at Association: The Inns of Chancery.—From very early times endeavours were made to associate solicitors and attorneys in bodies which would exercise some control over them, and give a certain amount of coherence to the profession. In the seventeenth century this object was sought to be attained by providing that solicitors should be members of one of the Inns of Court, and probably in earlier times the Inns of Chancery (of which Staple Inn, Furnival's Inn, and New Inn survived to our time) were composed entirely of attorneys. The prime object of these Inns was apparently education, but they no doubt exercised some control over their members. I am not aware in what way the practice fell out of use; probably the spread of communication and business all over the country rendered the Societies mere private unions of individual members of the profession. At all events, about the beginning of this century the control had entirely ceased, and it was probably owing to this that a Society known as "The Society of Practisers in the Civil Courts of Law and Equity" was established "for the promotion of fair and honourable practice, and the detection and discountenance of all unfair practices." The objects of this Society were almost identical with those of the well-known Companies of the City of London. This Society lasted until the beginning of this century, when it was apparently in active operation; but in the year 1816 it appears to have ceased to exist, for what reason is not known. Probably some of the members of this institution, certainly one of them, regretted its disappearance, as they took an active part in promoting the present Incorporated Law Society.

Formation of the Incorporated Law Society.—It is beside the purpose of this paper to give a history of that Society; but the work which it has performed, both for the profession at large and for the general public, has well entitled it to the confidence, not only of the Judges, who are generally acquainted with the leading members individually, but also of the Legislature, which has entrusted to it many responsible and onerous duties. But it

must be borne in mind that it is a voluntary association, with no power to compel membership on any solicitor, and only a moral power of enforcing discipline, any member who may be censured by the governing body, or who may apprehend that he is about to be censured by them, being at full liberty to withdraw from membership.

Its Functions: Examination of Candidates.—The first function of the Society in connection with discipline is the conduct of the examination of candidates for admission to the rolls. These examinations the Society conducts under various statutory powers, subject always to the right of appeal of any candidate from the verdict of the examiners to the decision of the Master of the Rolls—a right of appeal which has been exercised twice during the last ten years; and as during that period there have been admitted some thousands of solicitors, it may be assumed that the examinations are conducted in a manner satisfactory both to the authorities and the candidates. In no instance has the decision of the Society been reversed. The examinations consist, first, of a preliminary examination, which must be passed by every candidate before being articled, unless he has passed some one of several specified examinations or has taken a degree or been called to the Bar. The standard is about that for passing the Matriculation Examination for London University, and is a fair educational standard for a young man of seventeen. Any higher standard would unduly close the ranks of the profession.

The candidate has also to pass, during his articles, an intermediate examination in some set book or books (the book in use for many years has been Stephen's *Commentaries on the Laws of England*, as providing a complete survey of the whole of English Law), and finally, before admission, an examination in the whole subject of Law itself—Conveyancing, Equity, Common Law, Bankruptcy, Probate and Divorce, Admiralty, and Criminal Law. The standard is a fairly high one, and the examinations as conducted are admittedly superior in their extent and thoroughness to the examinations conducted by the Inns of Court for barristers. Having passed this examination, the candidate must satisfy the Society that he has conducted himself properly while under articles, and he is then, after signing a declaration similar to the oath originally required from attorneys by Statute 4 Henry IV., admitted as a solicitor on the rolls. The right of appeal to the Master of the Rolls extends to all the examinations and to the question of conduct.

As before observed, the solicitor, before actually practising, must take out and every year renew a certificate, upon which an annual duty is charged. The Society, as registrar, has the issuing of these certificates, which can be refused only on such grounds as that they have not been renewed each year, or that the applicant has become bankrupt, or the like. Appeal lies from the registrar to the Master of the Rolls.

Investigation of Complaints—The Statutory Committee.—Under the

Solicitors Act, 1888, the Society is further entrusted with the duty of inquiring into the complaints preferred against solicitors. The Master of the Rolls appoints a Committee of not less than three nor more than seven of the members of the Council of the Society to hear any application to strike a solicitor off the rolls, or to require a solicitor to answer allegations contained in an affidavit. The Master of the Rolls may also remove any member of the Committee or fill any vacancy. This Committee is a Statutory Committee, and quite independent of the Society or the Council. The applications are made to and heard by the Committee, who, after hearing the case, embody their finding in the form of a report to the High Court. If they are of opinion that there is no *primâ facie* case, the Society takes no further proceedings; but if the Committee are of opinion that there is a *primâ facie* case, the Society brings the report of the Committee before the Court. The Committee administer and take oaths and affirmations for the purpose of the inquiry, and provisions are made for making rules under this Act. The Court alone acquits or condemns and sentences the reported solicitor.

Merits of the Committee as a Tribunal.—It is impossible to speak too highly of the method in which this Act has been carried out. This is the opinion of almost every one who has conducted business before the Committee, and in which, from considerable experience, I can concur. There have recently been two attempts to impugn this tribunal in the public press; but on ascertaining the real facts from the papers in the cases referred to, it appears that these facts were not fully and accurately stated, and the true circumstances fully exonerated the tribunal from the accusation of leniency brought against it, and which was unfounded. The members of the Committee, although fulfilling an important public duty, are unpaid. The Government pass annually a vote of £2,500 towards the expenses the Society is put to in carrying out this Act, and this does not at all cover such expense. In consequence of the accusation above referred to, Mr. T. G Bowles gave notice this year of a motion to oppose this grant. Unfortunately he did not bring the motion on.

Testimony of Mr. Justice Cozens-Hardy.—The following letter was written by Mr. Justice Cozens-Hardy for the use of Sir Henry Fowler (the present Vice-President of the Society) in answering such motion, and his lordship has kindly sanctioned my publishing it. Mr. Addison, to whom it is addressed, is a former President of the Society.

50, Ladbroke Grove, W.,
June 15, 1900.

Dear Mr. Addison,—I have no hesitation in saying that I consider the Statutory Committee of the Incorporated Law Society an excellent tribunal to deal with the questions which you brought before it, and to report thereon to the Court. Some years ago I appeared as counsel before the Committee in a very heavy case, which lasted several days. I was greatly impressed with the care and skill displayed

by the three members of the Committee in dealing with the complicated details of business transactions. The report was so clear and so well reasoned that I found it a hopeless task to defend my client when it came before the Lord Chief Justice and Mr. Justice Lawrance. I do not believe any other preliminary inquiry would have been as satisfactory.

I may add that I saw no indication of a desire to screen a brother solicitor.

Only once since I have been a Judge have I had occasion to send to your Society papers involving a solicitor in what, unless explained, looked like gross professional misconduct. I have reason to believe that the matter was at once investigated, and that it would have been dealt with by your Committee, had not criminal proceedings been commenced, which resulted in a conviction.

I am, yours faithfully,

(Signed) HERBERT H. COZENS-HARDY.

J. ADDISON, ESQ.

You may show this letter to Sir Henry Fowler if you think fit; but I must not be considered to have expressed any opinion upon the burning question whether your Society ought to prosecute fraudulent solicitors.

I have shown the above paragraph to the following eminent counsel, who have authorised me to state that their experience of the tribunal concurs with that of Mr. Justice Cozens-Hardy:—Right Hon. H. H. Asquith, Q.C., M.P.; Mr. R. M. Bray, Q.C.; Mr. Lawson Walton, Q.C.; Mr. Boydell Houghton.

Recent Scandals—The Solicitor's Temptations.—The above is an account of the machinery for administering the discipline of the profession, but it is impossible, after the failures which have occurred and the recent correspondence in the press, to avoid dealing with some of the principal causes for scandal which have arisen. In a profession containing seventeen thousand members there must be not only dishonest men, but also weak men. The possession of a practically unlimited and uncontrolled power over large sums of money constitutes a temptation to which both solicitors carrying on family business and bankers are equally exposed—a temptation to deal with such funds by investing them, imprudently in the case of the banker, and, in the case of solicitors, in a manner not authorised by the terms of the trust and in accordance with his duty. The result may be in both cases an irreparable loss, and yet the acts which have brought it about may be acts done with a perfectly honest mind. The banker has this great check upon him—that he is liable to be called upon to replace the capital at any time. The solicitor has not. In most cases, so long as the interest is duly provided, the clients of the solicitor rest contented in the belief that the security is a proper and sufficient one. The temptation, therefore, to a weak-minded man who has in all good faith advised what he believes a good investment for his client is strong, instead of admitting his mistake and facing the possible loss of a valuable connection, to provide the interest himself, and he may for years continue to do this, still in the hope that his original estimate was correct—that the property would improve and the capital be recovered.

Once started on this course, the deceit he is practising will blunt his sense of honesty. He probably uses other money to bolster up the old security, and goes deeper and deeper; he increases his expenses—partly, probably, from recklesssness, partly from desire to present an appearance of prosperity —while his professional income is cut into by the interest he has to find, and so the end comes.

A Diagnosis—The Virtue of a Balance-Sheet.—Now, two things strike us in every one of these cases. So far as I know (i.) a defaulting solicitor has never made a purse for himself, but is always in a state of absolute impecuniosity; and (ii.) his books have never been balanced, nor his accounts regularly and honestly made up; the inference from which is that the dishonesty is not of set purpose, and that had he been compelled to look his situation full in the face, he would not have gone on when once he saw himself on the wrong side. The proper keeping of his books and the making up of an honest annual balance-sheet would have saved many a man from going from bad to worse.

For the man who deceives his client by pretending to invest on a sound security money which he deliberately puts on what he knows is a bad one, or who, receiving money to be paid to his client, appropriates it to his own purposes, nothing can be said or done. Such scoundrels exist, but a percentage of one per thousand probably exceeds their actual ratio to the honest practitioner. Dartmoor or Portland would be their destination whatever business or profession they entered. To endeavour, therefore, by all means to ensure the regular keeping of books and making up of a balance-sheet is an enterprise well worthy of the efforts of every one interested in the honour of our profession. Anything like compulsion is in this respect out of the question, as, having regard to the extraordinary variations in the nature of the practice, it would be difficult, if not impossible, to enforce, nor could the Incorporated Law Society make it a condition of membership without a change in their constitution which might produce serious results on their present numbers and in their efficiency for good.

Encouragement of Account Keeping by Solicitors.—The only suggestion I have seen which could effect the desired object is the formation of an association of solicitors on the lines of the provincial Law Societies, with the object of encouraging the keeping of accounts and the making up of annual balance-sheets. Such an association could only be formed if taken up by a great number of first-class firms, and must be subject and affiliated to the Law Society. Admission would be limited to members of that Society, and each member would have bound himself to submit his accounts and balance-sheet to the governing body whenever called on.

This last suggestion is the one sole and efficient safeguard. To compel the preparation of a balance-sheet annually by an accountant would be impossible and unavailing. The accountant would not know anything of the value of the securities, and no solicitor would submit to have them

inspected so frequently as once a year, but an accountant sent in occasionally for the purpose would be bound to make some enquiries as to the securities which have been selected. It would be invidious to call upon a member to submit his books, but a percentage of the members might be selected by ballot each year as subjects for such investigation.

No doubt this scheme is crude, and it may very possibly not meet with the approval of firms conscious of their business being well and properly conducted, and cognisant of the small proportion which the number of solicitors failing bears to the numbers of the profession, and also of the infinitesimal proportion which the amount lost bears to the amounts with which the profession deals.

Conclusion.—In every profession there are black sheep—unworthy members. It is a matter of just pride to us solicitors that there are so few of such members to be found in our ranks—that the honourable, high-minded solicitor is the rule to an extent not less than, but probably far exceeding, the like class in other professions. The concurrence of several regrettable cases of frauds or failures by solicitors has given an undue prominence to the professional malpractices of a few, and so may have created a false impression in the public mind as to the credit and honour of the profession.

One thing must not be forgotten—the profession of the lawyer has always been, and always will be, an unpopular one. Perhaps it is that the lawyer knows too much of every one's affairs to be regarded with favour by those who have secrets, pecuniary or personal, of which they grudge the knowledge; but whatever the origin of the prejudice, the result is that any cry raised against the profession is made the most of by the press, and widely circulated, grossly exaggerated, and over-coloured. But this is a traditional antipathy, not a personal feeling. The confidence shown in the individual adviser, and the knowledge so continually made evident that the client knows his interests to be as safe in the hands of his solicitor as, and probably safer than, in his own—a confidence and knowledge well founded in ninety-nine out of every hundred cases—shows that the discipline I have endeavoured to describe has not been without its effect, and has produced a class of men of which we are proud to form the constituent parts.

THE SUPPORT OF WAR BY WAR.

[*Contributed by* J. S. Risley, Esq.]

Sea Warfare Rules: Superior Certainty.—Rules of war in some rudimentary form have existed from very early times, but whereas the rules regulating the conduct of sea warfare have been constantly increasing in certainty and authority since the genesis of modern International Law in the seventeenth century, the conduct of land warfare has, until recent times, been left to the varying and inconsistent usage of belligerents in the field and the platonic prescriptions of learned publicists. This difference in the development of the two branches of the Law of War has been due partly to the existence of early maritime codes of recognised authority, such as the Consolato del Mare, in which the new-born International Law found the basis of a sea law ready to hand, and partly to the creation of naval prize-courts, which have given birth to a mass of authoritative case law and enabled neutrals to interpose as interested parties and co-operate in settling doubtful questions and building up the law.

It was the corresponding inability of neutrals to interpose during the course of hostilities which, to a large extent, formerly caused the rules and usages as to land warfare laid down, or at least advocated, by the publicists to be so vague and contradictory; whilst at the end of every war the settlement was necessarily a political one; and even where neutral Powers assisted in such settlements the primary importance of letting bygones be bygones and diminishing future bitterness rendered it inadvisable to review or pass judgment upon any acts of war the legality of which had been called in question, even in the case of acts whereby neutral interests had been prejudiced. But to this immunity from neutral interference must be added the entirely different character of the hostilities waged by land and sea. The circumstances of no two land campaigns are alike; the various contingencies that arise in the invasion of an enemy's country are so complex and diverse that the conduct of other belligerents in previous wars may well form precedents difficult or impossible to follow, and Selden's well-known sneer about equity and the Chancellor's foot might justly have been applied to the rules of land warfare and commanders in the field a hundred years ago.

Tendency to Settlement of Land Warfare Rules.—Since then a great development has taken place, due partly to the efforts of philanthropists and publicists, partly, no doubt, to the inherent interest of the subject and a variety of other causes which have combined to stimulate individual and concerted action on the part of the Powers. The official or semi-official manuals which individual governments now issue for the instruction of their armies in the field are of value as expressing the views held by them on debated points, and help to smooth the way for the codification of the law of land warfare at international conferences. Moreover, the railway and telegraph have brought governments into closer touch, and have made it easy and desirable to hold such conferences in time of peace for the purpose of settling rules which the passions excited by a war cannot possibly permit to be fairly discussed during its continuance or even at its immediate close. The first of these conferences was, if judged by its results, the most successful. It met on the invitation of the Federal Council of Switzerland at Geneva in August, 1864, and passed the famous Convention, which is probably the only piece of international legislation which has been universally accepted as of unquestionable authority. Other conferences succeeded. At Geneva in 1868 additional articles were framed at a second conference, but though signed by most of the signatories of the original Convention, they have never been formally ratified. A conference at St. Petersburg, also in 1868, made a declaration as to explosive projectiles which is binding upon its signatories. More recently there have been the important Conferences of Brussels and of the Hague.

Although neither the "Declaration" nor the "Convention," drafted respectively at the Brussels Conference in 1874 and the Peace Conference at the Hague in 1899, has the binding force, as it were, of an International Act of Parliament (which may fairly be said to be the character of the Geneva Convention), they are much more than pious expressions of opinion, and possess an authority which cannot be disregarded in present practice or in future attempts to arrive at a final settlement of the rules of war with which they deal. Nor is the single opinion of any publicist, living or dead, however eminent, sufficiently weighty to be adduced against the conclusions of these two conferences as to the rules which should regulate modern land warfare.

"Væ Victis."—Of first-class importance amongst the latter appear to be the rules determining the means by which war can be made to support war. It may be taken as a general principle of the Law of War that the stronger belligerent has the right to make the weaker pay his expenses, but humanity and "utility" alike demand that the extent of this right should not be measured merely by the stronger belligerent's might, and prescribe the definition of legal limits to its exercise. What, then, are those limits? These, like most other rules of land warfare, are not to be laid down in detail with absolute certainty and preciseness; but usage in modern warfare

and the trend of modern opinion as collected at Brussels and the Hague make it possible to outline in general terms the course of action permissible to the stronger of the two belligerents on invading the enemy's country.

At first he possesses the character of a mere invader, whose position is or may be a hazardous one, and his rights consequently extend solely over enemy persons and property actually within his reach. As his hold upon the country tightens, his invasion may be consolidated into complete military occupation, and his claim upon its resources enormously increases. Nothing succeeds like success. Finally, should military occupation ripen into conquest, the country passes entirely into his hands, and he can make it pay any proportion of the expenses of the war remaining unpaid which he may consider desirable. This, however, is merely a matter of administration, not of law, a measure of peace, not of war, and does not, therefore, come within the scope of this article.

Rousseau's Fiction: War a Relation of States.—When one belligerent invades the territory of another he is not at first brought into contact with the enemy State, but only with its armies and the civil population on his line of march. In considering the relation of the latter to the war, reference must be made to the amiable but absurd theory of Rousseau, that war is a relation of States alone, and an individual is a stranger to it, both in person and property, except when he is actually fighting or contributing to the prosecution of hostilities. This doctrine was wholly unknown to Grotius, Puffendorf, Bynkershoeck, and the other early publicists, and the only reason that any importance has ever been attached to it is that it was adopted by M. Portalis in opening the French Prize Court in 1801. He laid it down as follows: "La guerre n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs." The doctrine is in every way an objectionable fiction. As a matter of theory, a State apart from the individuals who comprise it is an abstraction to which force cannot be applied. The adoption of such a theory would render war practically impossible. And, as a matter of fact, the doctrine is wholly unsupported by practice, the usages of modern warfare, from the beginning of the last century down to the present day, having been absolutely at variance with it. The doctrine has always been repudiated by Great Britain and the United States and the smaller Continental Powers, as its adoption would negative the right of resistance by the civil population against invasion, and render a *levée en masse* illegal and impossible. It was this particular question which brought the Brussels Conference to a deadlock. Under Article 10 of the draft Declaration the inhabitants of territory *not yet occupied* by the enemy may, on the enemy's approach, make a *levée en masse*, and are lawful combatants if they respect the usages of war. This article, coupled with

the first eight articles, which deal with the military authority of an invader over the hostile territory *actually* occupied by him, would render a *levée en masse* unlawful when once occupation has been effected. On the ground that this would place a premium on the treacherous invasion of weak States by strong, the Declaration was resisted by the smaller military Powers, and the Conference broke up without giving binding force to its draft Declaration, which was signed by the delegates "merely as submitting the record of the proceedings, and not as pledging their governments in any manner." The Brussels Articles 9-11, dealing with the character of lawful belligerents, were substantially repeated in Articles 1-3 of the second Convention (as to land warfare) framed by the Hague Conference, 1899, Article 2 permitting a *levée en masse* in non-occupied territory. Between the Brussels Declaration and the Hague Convention there is, however, this important difference, that the latter is of far higher authority, its signatory Powers binding themselves to issue instructions to all their land forces in conformity with its articles. It is submitted that neither in the Brussels Declaration nor in the Hague Convention nor in any other part of International Law or practice has there been anything to divest the civil population of an invaded country of their enemy character. They are not spectators standing aloof, but enemies, and liable to be treated as such both in person and property. Their personal treatment of course depends upon their conduct, and if they commit hostile acts they forfeit their non-combatant character and the immunity from violence which attaches to it.

It is not, however, with the personal conduct and safety of the civil population that we are immediately concerned, but with the invader's rights over their property, and also over the public property of the State.

Invader's Rights over Enemy Property.—In ancient times, wherever enemy property was accessible, it was liable to seizure (*res hostiles, res nullius*), but the usages of modern warfare have considerably modified and restricted this rule. Certain kinds of public enemy property become immediately accessible to the invader. He can, for example, seize and use for military purposes the public lands and buildings of the towns which surrender to him. The conversion of a town-hall into a hospital means the saving of the labour and expense of extending hospital accommodation at his base, and to that extent it is a contribution exacted from the enemy towards the expenses of his own defeat. All the movable public property of the State which can assist the operations of the war can be seized by the invader without any indemnity, and the capture of military stores, transport, and all kinds of warlike material makes an important addition to the credit side of an invader's war account. The property, whether public or private, taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as "booty," or the legitimate spoil

of war, which vests in the capturing State, but is commonly divided amongst the captors upon principles laid down by each State's own municipal law. Booty, consequently, is not one of the means by which war may be made immediately to support war. Private movable property has always been at the mercy of the invader and liable to pillage or destruction; and this includes neutral property, which acquires an enemy character merely by being permanently situated in the enemy's country, whether its owner is domiciled there or not. It is, therefore, subject to all the consequences of lawful hostilities, just as enemy property is. But though the invader has a right to pillage or destroy, he usually spares private property for his own advantage, and it has been customary since the Thirty Years' War to allow the inhabitants to buy off pillage by the payment of a ransom to the invader, or by furnishing him with fixed amounts of provisions or other things requisite for his campaign. This custom has developed into the practice of levying contributions and requisitions from the inhabitants; and subject to their paying the former and supplying the latter, and committing no acts of hostility against the invader or violating the laws of war, their private property is now safe, except in cases of urgent military necessity, which may, for example, require the razing of houses to the ground or the destruction of crops.

Requisitions and Contributions.—Such being the origin of requisitions there can be no doubt that an invading army has the right to exact them from the inhabitants *without paying for them*, and also to require contributions for its support. In practice, requisitions consist in the supply of food or transport or articles of immediate use for the troops, or personal service, such as acting as a guide, blacksmith, or driver in the army, and may be exacted by the commander of any detached body of troops, either with or without payment. Contributions are payments of money, either in lieu of or in excess of the ordinary taxes. The *Instructions for the Government of the Armies of the United States in the Field*, issued in 1863, maintain "the right of a victorious invader to tax the people or their property, to levy forced loans, or billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches for temporary and military uses" (Art. 37). Article 38 of the same instructions provides: "Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given which may serve the spoliated owner to obtain indemnity." Article 39 of the draft Declaration of the Brussels Conference provides that pillage is expressly forbidden. Article 40 is as follows: "As private property should be respected, the enemy will demand from parishes, or communes, or the inhabitants, only such payments and services as are connected with the necessities of war, generally acknowledged in proportion to the resources of the country, and which do not imply with regard to the inhabitants the

obligation of taking part in the operations of war against their own country." By Article 41 contributions can be levied only by the commander-in-chief, and for every contribution a receipt must be given to the person furnishing it. Article 42 provides: "Requisitions shall be made only by the authority of the commandant of the locality occupied. For every requisition an indemnity shall be granted or a receipt given." The discussion at the Conference, however, clearly showed that such receipts do not imply any recognition of indebtedness on the part of the invader, and payment for them can only be arranged for at the end of the war, when, if the invader does not agree to pay, the Government of the occupied country may, if it sees fit, reimburse its subjects who have supplied requisitions to the enemy. The *bons de réquisition*, or receipts given by the invader, facilitate such a course, though their primary object is to protect holders from having to supply an unreasonable quantity of requisitions during the invasion. The invader's freedom from liability on such receipts is confirmed by the French *Manuel de Droit International à l'Usage des Officiers de l'Armée de Terre* of 1884 (p. 126) and by the American Instructions of 1863 already quoted, which merely suggest that such receipts "*may* serve the spoliated owner to obtain indemnity" (Art. 38).

It is clear, therefore, that an invader can, if he likes, make the invaded country contribute substantially to the support of his army by means of contributions and requisitions for which he does not pay at the time, and only gives receipts by which he incurs no liability for future payment. But although forced requisitions are permissible, they are objectionable where they can be avoided, as even when paid for on the spot, they are calculated to irritate the inhabitants and cause them to withhold or even destroy supplies, thus ultimately making the maintenance of an army a matter of increased difficulty. Consequently, as a matter of policy, it may be the better course to substitute a voluntary market for compulsory requisitions, and to invite the inhabitants to bring in supplies, and pay a fair price for them in ready money.

Wellington and Napoleon: the Franco-Prussian War.—The Duke of Wellington was averse to requisitions both in the Peninsula and France. After Waterloo, however, his army received their provisions and forage by requisition in the country; but in every case upon regular receipts by the commissioners attached to his troops, not with the view of paying for what had been received, but in order to avoid abuse and plunder and to restrict the requisitions to food and forage only. Napoleon levied enormous contributions and requisitions in his campaigns. In 1806, after the battle of Jena, he made Prussia pay upwards of £4,000,000, and after Suchet's conquest of Valencia in 1812 the district was forced to pay an additional 200,000,000 francs for the use of the army. But the exaction of contributions and requisitions in the Franco-Prussian war was probably the most ruthless that has yet been seen in civilised warfare, and no doubt

largely contributed to the hatred and bitterness produced by the war. On entering French towns and villages the Germans billeted their troops on the inhabitants, chalking up on the door of each house the number of soldiers to be provided for therein, and requisitions were addressed to the mayor for every imaginable thing: horseshoes, boots, clothes, provisions, wine, cigars, and even horses were frequently demanded. While in occupation of Versailles the Germans made daily requisition for 120,000 loaves of bread, 80,000 lb. of meat, 90,000 lb. of oats, 27,000 lb. of rice and other supplies upon a correspondingly enormous scale. At Chateaudun, after burning and pillaging the town, General Wittich demanded a war contribution of 200,000 francs, 1,500 blankets, 100 kilogrammes of salt, 100 kilogrammes of coffee, 400 litres of brandy, and 20,000 litres of hay. When the Germans under General von der Tann occupied Orleans, October 13, 1870, a contribution of 1,000,000 francs in specie was levied on the town through the mayor, which sum was subsequently reduced to 600,000 francs, and requisition was made for 600 cattle, 300,000 cigars, and all the horses in the town, the soldiers being at the same time billeted on the inhabitants. After the capitulation of Dijon, October 30, 1870, General Werder made the town pay £20,000 "caution money" for its good behaviour. No requisitions were made, but the German troops, 20,000 in number, were boarded and lodged and all necessaries for the army provided by the inhabitants. These are only a few examples of the German methods of making war support war; and, it may be added, in an official declaration by the French Government to the National Assembly, made May 22, 1872, it was stated that besides direct and indirect taxes the German troops had requisitioned a sum of over 327,000,000 francs. The movable objects carried away without requisition were valued at over 264,000,000 francs, whilst parishes and individuals had been spoiled to the amount of 600,000,000 francs, declared and recognised.

Regulations of Hague Convention.—The Brussels Conference was the direct outcome of the excesses of the Franco-Prussian War, and the articles in its draft Declaration bearing upon the regulation of contributions and requisitions have already been quoted or referred to. It has been said that that Conference was held too soon after the close of a great war to be able to discuss the usages of land warfare dispassionately, or effect any settlement of vexed questions. The Hague Conference, convened at a time when the peace of Europe had not been broken by any serious upheaval for twenty years, had a larger prospect, and may be said to have achieved a larger measure of success. The third section of the second Convention of the Hague contains the following regulations as to contributions and requisitions:

Article 49.—If apart from the taxes referred to in the preceding article [the ordinary taxes of the country] the occupying Power levies other contributions in money in the occupied territory, it shall only be for the needs of the army or the administration of this territory.

Article 50.—No collective penalty, pecuniary or other, shall be proclaimed against the populations by reason of individual acts of which they could not be considered responsible in the mass.

Article 51.—No contribution shall be collected except in virtue of a written order and under the responsibility of a general-in-chief. The collection shall only be proceeded with as far as possible according to the rules of the assessment and apportionment of the taxes in force. For every contribution a receipt shall be delivered to the contributories.

Article 52.—Requisitions in kind and of services shall only be demanded of communes or of inhabitants for the needs of the army of occupation. They shall be in accordance with the resources of the country, and of such a nature as not to imply on the part of the populations the obligation to take part in the operations of the war against their country. These requisitions and these services shall only be demanded with the authorisation of the commandant in the occupied locality. Levies in kind shall, as far as possible, be paid for in cash; if not, they shall be certified by receipts.[1]

The above form the latest instructions which the signatory Powers of the Hague Convention have bound themselves to give to their land forces as to the support of an invading army by contributions and requisitions.

"Occupation" of Enemy's Country: Effect of.—When, however, the invader has effectively occupied some portion of the enemy's country, his right to draw support from the latter, and his means of drawing it, are alike considerably enhanced. The first requisite of a military occupation is that it should be *effective*. On entering France in 1870, the Crown Prince of Prussia proclaimed that the establishment of a single post in any French canton would constitute a military occupation of the whole of that canton, the average area of a French canton being seventy-two square miles. If a territory could be "occupied" by such mere declaration or even by a small flying column, a *levée en masse* might always be prevented under Article 10 of the Brussels Declaration and Article 2 of the Hague second Convention. Accordingly, "a territory is considered occupied when it is placed actually under the authority of the enemy's army. The occupation only extends to those territories where that authority is established and in a position to be exercised" (Hague Art. 42, reaffirming Brussels Art. 1).

—— **Not Sovereignty.**—Military occupation does not create sovereignty, but only a special temporary administrative authority; it does not confer absolute proprietary rights, but only certain rights of control and appropriation. The occupant administers the government of the occupied territory, secures public order, and generally discharges all the administrative and executive functions of the temporarily displaced Government under the ordinary laws of the country, which are only modified or suspended in case of necessity —*e.g.* by the proclamation of Martial Law. In short, in the occupant's hands the occupied territory has "a double debt to pay," the expense of its own

[1] *The Times*, August 1, 1899, and *Correspondence respecting the Peace Conference*, 1899 [C—9534].

administration and the expense of supporting the invading army, and for these purposes he has the following rights over public and private property in such territory.

Public Property.—With regard to public immovable property "the occupying State shall consider itself only as the administrator and usufructuary of public buildings, landed property, forests, and agricultural estates belonging to the hostile State, and situate in the occupied country. It shall be bound to safeguard the substance of these properties, and to administer them in conformity with the rules of usufruct" (Hague Art. 55, reaffirming Brussels Art. 7). Therefore the occupant can use public land and buildings, or let them, and appropriate the rents and profits. In countries where the State is a large landowner, as in the South African Republic, this source of revenue should contribute materially to the expenses of the occupation. With regard to public movable property, the Hague Convention substantially repeats Articles 5, 6, and 8 of the Brussels Declaration in the following terms:

Article 48.—If the occupying Power levies in the occupied territory the taxes, rights, and tolls established for the profit of the State, it shall do so as much as possible according to the rules of the assessment and apportionment in force, and on it therefore will also rest the obligation to provide for the expenses of the administration of the occupied territory to the same extent to which the legal government was bound in that respect.

Article 53.—The army which occupies a territory shall only seize the specie, the funds, and the realisable securities belonging to the State in its own right, the depôts of arms, means of transport, magazines, and victualling, and in general all movable property of the State of such a kind as to subserve the operations of war. The plant of railways, land telegraphs (including cables at the landing-points), telephones, steamships, and other vessels, apart from cases governed by Maritime Law, as well as depôts of arms, and in general every kind of munitions of war, even belonging to companies or private persons, are equally means of a kind to subserve the operations of war; but they ought to be given back, and the indemnities for their use shall be adjusted at the conclusion of peace.

Article 54.—The plant of railways coming from neutral States which belongs to those States, or to companies or private persons, shall be sent back to them as soon as possible.

Warlike stores and materials, treasure, telegraphs, railway plant, and "all movable property of the State of such a kind as to subserve the operations of war" accordingly vest in the occupant; and it is clear that the mere control of all the railway systems, whether State-owned or belonging to private companies, enables him both to occupy the territory effectively and to administer its resources so as to support that occupation.

Protection of State Archives.—Certain public property has by usage acquired a sanctity which renders it safe from seizure. The immunity of State archives and historical records, for example, has been recognised by most civilised countries in their military manuals, as also that of charitable,

educational, religious, and scientific institutions. "The property of local bodies, that of establishments devoted to worship, to charity, and to teaching, to the arts and sciences, even when belonging to the State, shall be treated as private property. Every intentional seizure, destruction, or degradation of establishments of this kind, of historic monuments, of works of art and science, is forbidden, and ought to be prosecuted" (Hague Art. 56, reaffirming Brussels Art. 8).

Private Property: Pillage.—With regard to private property, both the Brussels Declaration and the Hague Convention formally forbid pillage, and the modern usage is for a military occupant not to touch private property in the occupied territory without making compensation, except in certain specified cases. Thus, private property may be seized by way of penalty for military offences, and the occupying State has the same right as the mere invader of exacting contributions and requisitions from the inhabitants, with the power to exercise it over an infinitely wider area. It may be noted that the Hague articles dealing with contributions and requisitions, quoted above, only refer to an "occupying Power." But the greater includes the less, and the restrictions established by those articles naturally extend to an invader before occupation is regularly organised. This is, moreover, positively implied in the final paragraph of that portion of the definitive text of the report relating to the third section of the Hague Convention.

Effectiveness of "International Legislation."—If the stronger belligerent only avails himself of the extensive rights over his enemy's public and private property which the Hague Convention gives him as invader and military occupant, it is submitted that, without any illegal or questionable exercise of his might, such as a confiscation of debts due to the occupied State, he can make the latter contribute a large proportion of the expenses incident to the invasion and occupation of its territory. When military occupation develops, under treaty or by lapse of time, into definite conquest, the gain to the conqueror is rather in the nature of a war indemnity or prize of victory when the war is over. The exercise of the rights of invader or military occupant, on the other hand—rights gradually established by usage and recognised and affirmed by international conference—constitutes a means of making the war to some extent pay its way from day to day whilst hostilities are still going on.

THE WEST INDIES AND CONFEDERATION.

[*Contributed by* Walwyn P. B. Shepheard, Esq., M.A.]

"**British Dependencies.**"—Provinces of the British Empire, insular or continental, near or remote, which are not represented in the British Parliament, but subject to distinct subordinate Governments, absolute or representative, are defined by Mr. Arthur Mills in his work on *Colonial Constitutions* as British dependencies. This definition is appropriate to the constitutional character of the relation between England and the several islands which are known as the British West Indies. These dependencies are also variously described by different writers as colonies, settlements, and possessions. Some of these islands were discovered by English navigators under the patents granted by the Crown for the discovery and occupation of lands uninhabited by Christian prince or people; whilst others became British possessions by conquest or cession from foreign sovereigns. In the former case grants from the Crown were obtained, and the settlements became at once subject to the English Common Law, and the settlers enjoyed all the constitutional rights and privileges of the people of England. But in the case of acquisition by conquest or cession the form of government was determined, and the laws were imposed by the Crown, subject only to the terms of the surrender or treaty of cession; hence the difference in administrative law between colonies acquired by settlement and those by conquest.

The constitutional relations between the subjects of the English Crown who have formed communities in distant territories and their sovereign are primarily based on that original, virtual, and implied allegiance owed by the subject to his sovereign antecedently to any express promise, oath, or engagement; in other words, on that natural allegiance which binds subjects born within the realm of England—*homagium ligeum*—the breach of which constitutes the crime of high treason. The early grants by the Crown of Colonial territory and jurisdiction contain the words of reservation, "Salvâ semper fide et ligeantiâ ac dominio directo nobis hæredibus et successoribus nostris debitis," etc. In the patent of discovery and occupation granted by Henry VII. to John Cabot and his sons in 1496 the grantees were to occupy the discovered territories as vassals of the Crown, for whom the dominion, title, and jurisdiction were to be obtained.

Early Colonisation Charters.—A perusal of a few of these early Charters will afford evidence as to the constitutional principles upon which our Colonial empire was sought to be founded.

The Crown lawyers of the Elizabethan and Stuart periods appear to vary but little in their perception and enunciation of the relations to be established between the Crown and the people who left England to form communities in distant lands. In 1578 Queen Elizabeth by Royal Charter empowered Sir Humphrey Gilbert, of Compton, Devonshire, to discover and take possession of all remote and barbarous lands unoccupied by any Christian prince or people, and vested in him as grantee the propriety of the soils, reserving one-fifth of all gold and silver ore for the Crown, with power to dispose of the lands in fee simple or otherwise, according to the laws of England, to persons within the allegiance of the Crown, such lands to be holden by the grantees of the Crown, by homage and by payment of the said one-fifth part of all gold and silver ore, and on the grantee was conferred divers jurisdictions and royalties, with powers of government both executive and administrative, but subject to the proviso that all who should settle in the discovered lands should have and enjoy all the privileges of free denizens and natives of England, any law, custom, or usage to the contrary notwithstanding. In the subsequent patent of 1584 granted to Sir Walter Raleigh, the subjects who settled in the discovered territories were to have all the privileges of free denizens and natives of England within the royal allegiance in suchlike ample manner and form as if they were born personally and resident within the realm of England, any law, custom, or usage to the contrary notwithstanding. It is to be noted that in both these patents of Queen Elizabeth the lands were to be held of the Crown by homage and payment of one-fifth part of the gold and silver ore for all services, duties, and demands.

The Settlement of Virginia.—Actual settlements do not appear to have been made under these patents of discovery until the reign of James I. That monarch possessed a genius for colonisation. He established in the Highlands and Western Isles of Scotland, and in the northern counties of Ireland colonies of people brought from more industrious communities; he became interested from the first in the projected settlement of Virginia, and, it is said, personally drafted the letters patent of 1606 under which territories in North America were conferred on Sir Thomas Gates and his associates. The colonists were divided into two companies: the one, of adventurers from London, was called the first colony; the other, of merchants from Bristol and other Western towns, was named the second. It was declared that the colonists and their children should at all times enjoy the same liberties as if they had remained or were born within the realm of England. The government of each colony was vested in a council of thirteen, to be appointed by the Crown, with power to order all matters and causes according to Ordinances by the Crown and under the Privy Seal.

A council of thirteen was also to be appointed in England, to be called the Council of Virginia, for the superior management and direction of the two colonies. The tenure of the lands was of the Crown, as of the royal manor of East Greenwich, in the county of Kent, in free and common socage only, and not in capite.

In the first Charter of Virginia the Crown assumed direct legislative powers, and in the Charter of New England legislative power was vested in the council at Plymouth, incorporated by the Crown for the government of that colony; but in the Charter of Maryland, of 1632, by Charles I. to Lord Baltimore, the legislative power was vested in the Governor and the freeholders of the territory.

The Settlement of the West Indian Islands.—Charles I. had, however, in 1627, formed a colony of the West Indian Islands by making them into a province and vesting the same and its government in Lord Carlisle, with a proviso that all laws were to be made "de et cum consilio assensu et approbatione liberorum tenentium ejusdem provinciæ vel majoris partis eorundem," so as, notwithstanding, the said laws should be agreeable as near as conveniently might be to the laws, statutes, customs and rights of the Kingdom of England, and not repugnant thereto and to reason. The territory comprised in this royal grant included the following, as well as other islands in the Caribbean Sea—namely, St. Christopher, Grenada, St. Vincent, St. Lucia, Barbados, Dominica, Guadelupe, Antigua, Montserrat, Nevis. This Charter is of historic interest, being a complete scheme for the creation, settlement, and government of a new colony. As regards the land tenure of this province the grantee was created absolute lord of the region under true faith and allegiance to the Crown, and the grantee, his heirs, and assigns were to hold of the king of England in capite by knight's service and by a yearly rent and the gift of a white horse to the king if he came within the region, and payment of one-fifth part of all gold and silver ore found therein.

Barbados.—The Constitution of Barbados, as settled and confirmed by the Commonwealth of England, 1652, was as follows:

> That the government of this island be by a Governor, Council, and Assembly, according to the ancient and usual custom here; that the Governor be appointed by the States of England, and from time to time received and obeyed here, the Council be by him chosen, and an Assembly by a free and voluntary election of the freeholders of the island in the several parishes; and the usual custom of the choice of the Council be represented by the Commissioners to the Parliament of England, or to the Council of State established by authority of Parliament, with the desires of the inhabitants for the confirmation thereof for the future.

It has been necessary to refer at some length to these old Charters in order to gain a clear perception of the primary constitutional relations to the Crown of our earliest colonies, including those in the West Indies.

Confederation.—The term confederation is in strictness only applicable

to a federal union of independent sovereign states; but it has been employed to indicate a policy which was once in the ascendant with the advisers of the Crown on Colonial matters. It is necessary to glance at the causes which gave rise to the policy which has been thus designated.

Early State Policy.—Before the era of the economists and free trade, the relations between the colonies and the home country were regulated by the now exploded maxims of the mercantile system. Whilst that system was in force the channels of Colonial trade were monopolised by English statesmen for the benefit of the shipping and other commercial interests of the home country; and in return for the benefits which were supposed to arise from the monopoly thus secured the colonies were pampered with all the devices of the protectionists. But when free trade dispelled the illusions which lay in this vicious circle of the protectionists, public opinion demanded that the people of the home country should not be taxed in order to support a protectionist *régime* for the colonies. The extreme section of this anti-Colonial party insisted upon complete severance from the colonies, whilst the more moderate urged the necessity of making the colonies provide, out of their own resources, adequate contributions towards the cost they entailed upon the home country. The Imperial Government had never countenanced the extreme views of the anti-Colonial party, but its Colonial policy was modified to the extent of requiring each colony to bear in mind that the day would come when they must rely more and more upon their own resources for all the ordinary contingencies of administration.

Its Influence on the West Indies.—The West Indies could not expect to escape the influence of this policy. But its operation upon them would from the first take a different form from that which it would take in some of the larger and more territorial colonies. With these the ultimate aim of the English Government was to make them self-dependent—capable, out of their own resources, of providing for their own protection. No such future could, however, be entertained for the West Indies. They were split up into island communities, separated from each other by miles of sea. Moreover, no English statesman could mistake the import of a West Indian census with its subdivision of population into white, coloured, and black. It required no Jamaica insurrection to demonstrate an eventuality against which the Imperial Government was bound to provide in colonies of mixed races. Otherwise, at any moment, it might find itself involved in military operations of a costly and unpopular character. The eventuality of a European or American war in which this country might be engaged must be left out of consideration. In such a case the safety of the West Indies and the protection of its commerce must fall upon the Imperial navy. This, however, would be a liability common to all the colonies—one which no efficiency of administration on their part could neutralise. But the liability incident to the government of a colony of mixed races,

wherein the governing race was numerically a small fraction of the whole population, might be reduced to a minimum by firm and judicious administration and a strong executive, and by bringing, as was done in Barbados, cheap, prompt, and impartial justice at the hands of stipendiary magistrates within reach of every member of the labouring classes.

That strong executive could, however, be no other than the power of the Crown acting through its constituted nominee or through some executive council. The colony might possess some form of legislative assembly. It might enact laws subject to the veto of the Crown. In short, the home Government would guarantee law and order for the security of life and property in the colony, but, in order to reduce the liability under this guarantee to a minimum, it must retain a controlling voice in the legislation and a controlling power in the administration of the law. That view prevailed at the Colonial Office.

Controlling Power of the Crown.—As we glance through the constitution of the several West Indian colonies we find this controlling power more or less operative over all the legislative and administrative functions. Moreover, an English Act of Parliament binds the colonies if it names them, and would thus override any Colonial Act with which it might come into conflict.[1] And the ultimate jurisdiction in every colony is vested in an appeal to the Queen in Council. We thus see what a modified autonomy each colony possessed—modified not in any limitation of the scope of its authority, but in the fact of its absolute dependence upon a power external to itself. It is necessary to bear this in mind, lest the terms "House of Assembly," "Legislative Council," should imply that complete autonomy which has all sovereign power inherent in itself.

On the other hand, it must not be supposed that the "House of Assembly" was a mere grand name for a body exercising functions more or less akin to those exercised by a parochial vestry or a borough council under some Local Government Act.

Legislative Power in the West Indian Colonies.—Saving the fact of its subordination to the supreme authority of the English Parliament, the legislative power of each colony was unlimited. It might range over the whole sphere of the law of persons and property. And more than one West Indian colony can produce in its Statute Book a very creditable testimony to the wisdom and ability with which it has exercised its legislative powers. But from time to time serious complaints arose from many of the colonies. It was found that the legislative machinery would not work on so small a scale. It was impossible in small communities, out of a limited constituency, to find the requisite legislative capacity; local matters might receive efficient attention, but the more important enactments incidental to the law of persons and property were left in a crude and

[1] Any doubts which might formerly exist as to the supremacy of the English Parliament seems now set at rest by the Colonial Laws Validity Act, 1865.

unsatisfactory condition. The administration of justice, too, was not generally settled on so satisfactory a basis as that in Barbados, and discontent began to manifest itself. The outbreak in Jamaica startled the people of this country, and riveted public attention to the fact that in the West Indian colonies the English Government was responsible for the contentment and good order of a large black population. After the Jamaica outbreak the old Constitution was abrogated, and that colony became subject to the direct responsible Government of the Crown. It lost its right of self-taxation.

Consolidation of the Leeward Islands.—In 1871 the Leeward Islands Act was passed, and thereupon the islands of Antigua, Montserrat, St. Christopher, Nevis, and Dominica, with their respective dependencies, and the Virgin Islands, became one colony. In 1876 the island legislatures of St. Vincent, Tobago, and Grenada abrogated their Constitutions and gave power to the Crown in Council to create a new form of Government and Legislature. These local Acts had effect given to them by the Imperial Act of 39 & 40 Vict., No. 47.

Crown Nominees.—The system of introducing Crown nominees into Colonial legislation has been thus condemned by Mr. Arthur Mills in his work on *Colonial Constitutions*:

> Except in those languid Colonial communities in which no institution could provoke intolerance or excite enthusiasm, nominated legislative councils have been generally regarded simply as the creatures of patronage or the instruments of despotism.

And in a note to this passage the author says:

> It was for the alleged purpose of counteracting the convict element, to which absolutely free institutions might, it was thought, have then given undue prominence, that a composite Chamber, of which one-third were nominees and two-thirds elected members, was established in South Wales in 1841. This form of constitution was extended to South Australia and Van Diemen's Land by the Australian Colonies Government Bill of 1850. It was in reference to the provisions of this Bill that a late member of the Council of New South Wales thus avowed what he declared to be the general opinion in the Australian colonies respecting nominated legislative councils:
>
> "If there be any one institution which tends to bring the Home Government into collision with the colony, to disturb the action of the constitutional system, to throw discredit upon public men, to introduce discord into the public councils, and to create every disturbance which it is desirable to exclude from the deliberations of a Legislative Assembly, it is the institution of Crown nominees. They represent nobody; they have not the slightest affinity to an aristocratic institution; they are the scapegoats of the Constitution, the target for every attack, the butt of every jest. Ignominy and obloquy rain thick upon them; and when it is asked whether the Colonies have materials for a second Chamber, the question may, I think, with more propriety be put, Can they have materials for nominees? Can they have people so paramount in talent, so independent in property, so conciliatory

in manner, so combining all sorts of contradictory attributes, that they can hold this invidious office without exposing themselves to the sort of treatment to which I have alluded? That I think is impossible, and it is not my opinion alone, but that of almost every person through the Australian Colonies."[1]

Sketch of Present Constitutions.—At the present date the Constitutions of the West Indian dependencies are as follows:

1. The Bahamas—
   Executive: The Governor.
   The Executive Council of nine members, who have seats in one or other branch of the Legislature.
   Legislative: The Governor.
   The Legislative Council of nine nominated members.
   The Representative Assembly of twenty-nine elected members.

2 Barbados—
   Executive: The Governor, with an Executive Council and an Executive Committee which includes the Governor and the Executive Council, together with one member of the Legislative Council and four members of the Assembly, nominated by the Governor.
   Legislative: The Governor.
   The Legislative Council of nine members, nominated by the Crown.
   The House of Assembly of twenty-four members, elected annually on the basis of a moderate franchise.

3. Jamaica—
   Executive: The Governor, with a Privy Council of members nominated by the Crown.
   Legislative: The Governor.
   The Legislative Council of six ex-officio, five nominated, and fourteen elected members.

4. Leeward Islands (consisting of the five presidencies of Antigua, St. Christopher and Nevis, Dominica, Montserrat, and the Virgin Islands in one colony).
   Executive: The Governor.
   The Executive Council, nominated by the Crown.
   Legislative: The Governor.
   The General Legislative Council, consisting of ten nominated and ten elective members, chosen

[1] Speech of the late Lord Sherbrooke (Mr. Lowe) at a Meeting of the Society for the Reform of Colonial Government, held June 1, 1850.

by the unofficial members of the island councils of Antigua, Dominica and St. Christopher, with Nevis, out of the three respective island councils.

Each of the five presidencies has local executive and legislative councils composed of non-elective members.

5. Trinidad and Tobago—

Executive: The Governor.
The Executive Council of seven members.

Legislative: The Governor and
The Legislative Council composed of the Governor as President, and nine official and eleven unofficial members, all nominated by the Crown.

6. The Windward Islands, comprising Grenada, St. Vincent, and St. Lucia grouped under one Governor in 1885.

Executive: The Governor.

Grenada—

Executive: The Executive Council, consisting of the Governor and Crown Nominees.

Legislative: Legislative Council, consisting of the Governor and five official members nominated by the Governor, and seven unofficial nominated by the Crown for six years.

St. Lucia—

Executive: The Executive Council, consisting of the Administrator and official members.

Legislative: The Legislative Council, consisting of the Administrator and official and unofficial members nominated by the Crown.

St. Vincent—

Executive: The Administrator and Executive Council.

Legislative: The Legislative Council, consisting of the Administrator and four official and four nominated unofficial members.

Self-taxation and Independence.—The right of self-taxation is a security for Colonial liberty. Once let a colony lose this right, and nothing remains for its security against official domination in all its local affairs except pathetic and probably fruitless appeals to the mother country. And in that case the colony will soon find out the truth of the view put forward by Bentham, when writing on the Colonies:

The Sovereign, at two thousand leagues' distance from his subjects, can be acquainted neither with their wants, their interests, their manners, nor their character. Their most legitimate and weighty complaints—weakened by reason of distance, stripped of everything which might excite sensibility, of everything which might soften or subdue the pride of power—are delivered without defence

into the cabinet of the prince to the most insidious interpretations, to the most unfaithful representations. The colonists are still too happy if their demand of justice be not construed into a crime, and if their most moderate remonstrances are not punished as acts of rebellion. In a word, little is cared for their affection, nothing is feared for their resentment, and their despair is contemned. The most violent procedures are easily disguised under an appearance of necessity, and the best intentions will not always suffice to prevent the sacrifice of the public to private interests.

Conclusion.—The conclusion seems to be that the policy of so-called "confederation" has evolved complication rather than simplification in the government and legislatures of the West Indian communities. The abrogation of the representative element in several of the islands has rendered them voiceless communities; they have no longer any power to speak by a representative vote. The real bond of union is the Crown. The desire for union seems satisfied by the common allegiance; but for unity into one colony, province, or dominion, no desire is apparent, nor would it be easy to give effect to such a desire were it to arise. These island communities of British subjects should all possess some simple means of voting by elected representatives their own taxation, and an address when necessary to the Crown. The islands are separated by miles of sea; and to a closer and more territorial political union it may be said, *opposuit Natura.*

THE LAW OF SOUTH AFRICA.

[*Contributed by* W. F. Craies, Esq.]

Conquered Territory and British Policy.—It has been the general policy of the British Crown in dealing with conquered territory to interfere as little as possible with the existing laws and customs of the inhabitants of the territory. In pursuance of this policy the Law of old France was left standing in Lower Canada, and that of Spain in Trinidad. But soon after the conquest of Canada the Crown Law of England was substituted for that of France;[1] and during the present century the old French Law, already abolished in France, was found to be unsuited in form and substance to the needs of the province, and the feudal land tenures imported from France were abolished by the Canadian Legislature. The Civil Law, till then resting on the Coûtume de Paris, was codified, partly on the model of the Code Napoléon, partly in conformity with English Law; and local government rests on Colonial legislation and not on French Law.

In Trinidad the inconvenience of preserving Spanish Criminal Law was shown in *Picton's* case (30 St. Tr. 225), where it was suggested that judicial torture was legal under that law; and by a process discussed in detail in this Journal[2] the English Law has been substituted for the Spanish, except in a few cases.

The changes in Trinidad—an isolated colony with a small white population—are precedents of secondary importance. In the case of Canada, however, it is to be noted that the French Law has been restricted to a single province, in which the population of French origin is in a very large majority, and does not extend to any of the other provinces, all of which are under the English Common Law as modified by provincial and federal legislation. And at the present time no serious difficulties arise in colonies acquired from France or Spain in the ascertaining or administration of so much of the old French or Spanish Law as has survived local legislation.

Roman-Dutch Law in the Empire.—But there remains another system of law which has been preserved in the British Empire in pursuance of the policy already indicated, and it is the Roman-Dutch Law. When the province of New York was taken from the Dutch, the English Common Law was substituted for Dutch Law. But on the conquest of Ceylon a Royal

[1] See the Quebec Act (149 3 c. 83), s. 11.

[2] *Journal of Comparative Legislation*, 1st Series, vol. i., p. 318.

Proclamation, dated September 23, 1799,[1] was promulgated. By Articles 1 and 2 the Roman-Dutch Law was preserved, with the abolition of certain cruel modes of punishment permitted by that law, such as breaking on the wheel, and the practice of examination of accused persons by means of torture.[2]

On the conquest of British Guiana the Roman-Dutch Law, so far as it applied to that territory, was continued under stipulations in the Articles of Capitulation of 1803.[3] And in the Cape Colony the Roman-Dutch Law, so far as there in force in 1806, was preserved on the final cession in 1815. At that time the white inhabitants of South Africa were almost wholly of Dutch or Huguenot descent, speaking a dialect of Dutch which has now developed into what is known as the Taal, and the territory was occupied in the main, as it had been occupied by the States of Holland,[4] as a half-way station on the sea route to India and China.

With the extension of British sovereignty in South Africa outside the original limits of the Cape Colony, the Roman-Dutch Law, with or without the modifications affected by Cape legislation, has by degrees been extended to each new territory.[5] The Orange River territory, while under British dominion, came under the same *régime*, and the grant of independence has not affected this. The settlers in the Transvaal took with them the law of the colony from which they trekked.

The result is, to use the words of Chief Justice Kotze, that

> "In all the South African colonies and States the Roman-Dutch Law, as it prevailed in Holland previous to the introduction of the Code into that country, is still in force,"[6]

subject, of course, to changes effected by legislation.

But he adds that—

> "By a local statutory provision the Courts of Justice in the Transvaal must regulate their decisions agreeably to the law as laid down

[1] Printed in *Stat. R. and O. Rev.*, vol. viii., p. 414. For the Charter of Justice of the colony granted in 1833, vide *l.c.*, p. 416.

[2] Compare the abolition of torture in Scotland on its union with England (7 Anne, No. 21, s. 8).

[3] Printed in *Laws of British Guiana* (rev. ed. of 1895), vol. i., p. 8.

[4] See *Thurburn* v. *Steward* [1871], L.R. 3 P.C. 511.

[5] Basutoland, by Order in Council, November 3, 1871. The Order in Council of February 2, 1884 (*Stat. R. and O. Rev.*, vol. viii., p. 392), disannexing Basutoland from Cape Colony, preserves the laws in force in the severed territory until altered by the High Commissioner in South Africa. British Bechuanaland was incorporated in the Cape Colony by Order in Council of October 3, 1895 (*Stat. R. and O.*, 1895, p. 738). The Cape Colony laws had previously been put in force there by Proclamation of October 6, 1885. The Transkei territories have also been added to the Cape Colony; the latest, Pondoland, in 1894 (see *Sprigg* v. *Sigeau* [1897], App. Cas. 238). The Law of Southern Rhodesia is regulated by an Order in Council of October 20, 1898 (*Stat. R. and O.*, 1898, p. 385), made under the Foreign Jurisdiction Act, 1890, which appears to apply the Law of the Cape Colony as it stood on June 10, 1891, subject to certain modifications.

[6] Kotze, C. J., *Introduction to Translation of Van Leeuwen's Commentaries*, p. 7. Cf. *Denyssen* v. *Mostert*, L.R. 4 P.C. 236.

in the *Introduction* of Grotius (1630), the *Commentaries* of Van Leeuwen (1678), and the *Institutes* of Van der Lenden (1806); but when these authorities differ or are silent on any given point, the Courts must decide in accordance with the general practice obtaining in South Africa."[1]

"In certain branches of law, such as mercantile law, insolvency, and procedure, a great many new doctrines have from time to time, by judicial decision and legislative enactment, been engrafted on to our Dutch jurisprudence, assimilating it in some respects to the English system; but the Common Law of South Africa is unquestionably the Roman-Dutch Law, as it obtained in the Netherlands at the commencement of the present century."[2]

Roman Law was adopted in Holland not as the Common Law, or *coutumier*, of the country, but as a common law of nations, and used in cases where particular laws or customs failed.[3] But the Feudal Law and a multiplicity of local ordinances and customs overruled or varied it in many details; and in substance the duty of the Dutch Courts was to do justice according to the laws and ordinances of the land, according to the privileges and well-established customs and usages,[4] and in default of these according to the written (*i.e.* the Roman) law, which was received partly *in subsidium*,[5] and partly by full adoption,[6] as to subjects on which the native law was silent.

Extinction of Roman-Dutch Law in Holland.—So far as Holland is concerned the Roman-Dutch Law is now absolutely dead, having been superseded by a series of Codes apparently based on the French Code; and no attempt has been made since 1815, nor after the separation of Belgium in 1831, to restore the former law or the diversity of local customs by which it was varied in the different provinces of Holland. Holland is now governed by Codes or Statute Law framed in the main on French precedents. The result of this is that there is no living system of jurisprudence like the Common Law of England to which lawyers in the three colonies can resort for the elucidation of difficulties arising under the seventeenth-century form of Roman-Dutch Law which the colonists carried abroad with them; and this is so far recognised in Holland that the States General lately passed a grant for establishing in Dutch universities classes of South African Law.

[1] *Van Leeuwen*, translated by Kotze, p. vii.

[2] *L.c.*, British Maritime and Shipping Law was always administered by the Cape Vice-Admiralty Court, but was also applied to cases in the Supreme Court by Act No. 8 of 1879, in consequence of a conflict which had arisen between that law and Roman-Dutch Law (*Smith* v. *Davis*, 1878, Buchanan, Cape S.C., 66).

[3] *Van Leeuwen*, ch. 1, s. 11.

[4] *Van der Linden*, translated by Sir H. Juta, p. 3.

[5] Cf. M. de Villiers, *Roman and Roman-Dutch Law of Injuries*, p. 13.

[6] Van der Keessel, *Select Theses on the Laws of Holland and Zeeland* (2nd ed.), 2.

Roman-Dutch Law in Ceylon: Its Decay.—The inconveniences of this condition of affairs are obvious. The position in Ceylon is thus stated by Mr. Justice Clarence in an article in this Journal (1st Series, vol. i., p. 231)[1]:

> One unfortunate incident in the substantive law is the survival of the Roman-Dutch Law. The continued existence of remnants and traditions of this law in a decaying and semi-obsolete condition has been the parent of much unwholesome uncertainty. As the Dutch lines recede farther into the past, the doctrines of the Roman-Dutch Law of the past century become less and less applicable to the present condition of life. Theories and remnants of procedure originally founded on Dutch institutions no longer extant still linger to hamper and confuse the administrator of justice. Lawyers are largely educated from English text-books, and few can read the Latin of the Roman-Dutch jurists. Yet, in spite of wholesale introductions by Statute of English Law, pure and simple, in various departments, various remnants of Roman-Dutch doctrine still lurk in all directions. Some years ago, in a litigation between members of a Sinhalese family, much expense and delay was occasioned by the question whether under certain circumstances of a succession under an intestacy the inheritance should devolve according to the Dutch Law of North Holland or South Holland. An Ordinance of 1876 for the regulation of matrimonial rights now provides for the matter.

And he adds:

> It would be a boon to all classes of the community if the vestiges of Roman-Dutch Law were now finally swept away.

To this it may be added that it has been found expedient to adopt the English Law as to bills of exchange, banking, carriers by land, insurance, maritime matters, principal and agent, partnership, sale of goods, and shipping. In this respect the colony follows the general tendency of Colonial legislation, which is to adopt the commercial law of the mother country. But Ceylon has also adapted from Indian models Codes of Civil (1889) and Criminal (1893) Procedure, a Penal Code of 1883,[2] and an Evidence Code (1895), with the result, as stated by Mr. Justice Clarence, that with the exception of certain customary law of the different native communities, the law of the colony rests mainly on legislation, with only a small and inconvenient residuum of the Roman-Dutch Law, which governs both Europeans and natives where ordinances and native customary law are silent.

—— **in British Guiana.**—In British Guiana the Roman-Dutch Law as to crimes and criminal procedure has been abolished, and with reference to these matters the Law of England applies when the legislation of the colony makes no specific provision; but for the most part the subject is governed by Consolidation Ordinances.[3] British Mercantile Law has also

[1] In his opinion he differs from that expressed in 1854, in favour of the general superiority of the system of Dutch jurisprudence over the English in point of simplicity, and completeness, and freedom from technicality and refinement (see Preface by Lorenz to *Translation of* Van der Keessel's *Theses on Dutch Law.*)

[2] Even prior to that date Roman-Dutch Criminal Law had gradually become obsolete, and had been superseded by a sort of criminal equity.

[3] See Ordinance No. 18 of 1893.

been applied by Colonial Ordinance; and the Ordinances of the colony from 1774 to 1895 have been collected and consolidated, revised and edited, under legislative authority in a manner which will make codification easy when and if it is deemed necessary, and which affords an excellent precedent for other colonies.[1]

—— **in South Africa.**—In South Africa the Dutch-speaking element in the population is proportionately far greater than in Ceylon and British Guiana. But until recent years the intercourse with Holland, and resort to that country by Cape Dutchmen, have been comparatively small, and Hollanders have not emigrated much except to hold Government posts in the Transvaal.

The inconveniences in the administration of South African Law arising from resort to a defunct system are best indicated by reference to the opinions of eminent South African jurists. In *R.* v. *Kaplan* [1893] 10 Juta 259, Sir Henry de Villiers said, "considering the uncertainty and want of precision which characterises the Criminal Law of Holland, this Court has always deemed it its duty to adhere to any rule of Criminal Law practice once established." And on another occasion he pointed out that the punishment of breaking on the wheel for treason and other like cruelties of that law had never been formally abolished in the Cape.[2] But the Charter of Justice of 1832 introduced the system of trial by jury in criminal cases, and much has been done by legislation to substitute the English rules of law and evidence in criminal cases; and as regards criminal libel, the English Law was adopted bodily in 1882. Of the Dutch Law of Crime this much alone is clear, that justice is not administered in Holland according to the laws of Moses:[3] and the difficulties of ascertaining and applying the old law in civil cases are very considerable. In *Seaville* v. *Colley* [1891], 9 Juta 39, the Court had to determine—

(1) The nature of the *lex Anastasiana* as to *retraction*;
(2) The modifications of that law by the Dutch Courts;
(3) Whether the law, as modified, was so far applicable to the Cape Colony as to have been carried there by the settlers.

In giving judgment, Chief Justice de Villiers, at p. 44, said:

> "As to Statutes enacted by the Legislature of this colony since 1806, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate it. They were duly promulgated at the time when they were enacted, and have all been published in authentic form. If such a Statute is no longer required, the Legislature, which must be presumed to be acquainted with the body of its own Statute laws, is at hand to enact the repeal.

[1] *Laws of British Guiana*, 1774–1895, five vols.

[2] It is not infrequently found difficult to find how far a crime known to Roman-Dutch Law is recognised in the Cape Colony, and what is its appropriate punishment. See *R.* v. *Fortium* [1883], 1 Buchanan Cape Ct. App., 290.

[3] Van der Keessel, *Theses* (2nd ed.), p. 1.

> But the body of laws introduced from Holland, the Statutes of India, and the local Statutes passed before 1806, stand on a different footing. They are not all to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this colony at the date of the British occupation in 1806 may be briefly stated. The presumption is that every one of these laws, if not repealed by the Local Legislature, is still in force.[1] This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by an overruled judicial decision. In the absence of such decision the Court may take judicial notice of any general custom which is not only well established, but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to a matter of frequent occurrence, been distinctly recognised and acted on by the Supreme Court, may fairly be held to have been abrogated by disuse."

Perpetuation Undesirable.—The result of permitting the continuance in South Africa of so much of the Roman-Dutch Law as has survived local legislation, and can be ascertained and is applicable to South African conditions, and is not obsolete, is obviously to perpetuate unnecessary difficulties in the administration of justice. When half, or perhaps now more than half, of the white population is not of Dutch origin, and the vast majority of the population is not of European origin, it would, apart from sentiment, seem as undesirable as it has been found in Ceylon to continue to require the ascertainment of much of the South African Law from seventeenth or eighteenth century books, which are either in mediæval Latin or in a form of Dutch widely different from the South African dialect, and which have, for practical use, to be translated into English.

South African Federation.—If federation of the South African colonies and states is contemplated, it is obviously expedient that they should have, as Canada has, a common system of Criminal Law and Procedure, and that the Commercial Law, including Insolvency Law and the Maritime Law and the Law of Contracts, should be common. And we may go further and say, that one of the best means of creating a united South Africa is to create a system of South African Law not by substituting the Common Law of England for the Roman-Dutch system, but by a

[1] See *Thurburn* v. *Steward* [1871], L.R. 3 P.C. 478, where it was held that a *placaat* of the Emperor Charles V. of October 4, 1540, formed part of the law of the colony, and had not been affected by Colonial legislation.

proper and systematic creation of a series of South African Codes dealing completely and effectively with the main branches of law. This was the policy of unification in the Code Napoléon which swept away the local laws of France. This is the present policy of the German Empire in its codes; and Italy has completed unification by codification. If such a plan be adopted, neither the British nor the Dutch in South Africa need refer to the systems of Europe, or quarrel about the merits of the laws of their domicil of origin. They could use in common a system of law framed, with a view to South African requirements, by judicious selection from the laws of other countries of that which seemed best suited for their local needs. There are no doubt many Statutes in force in the different states in South Africa of a purely local character, which need at most only collection and consolidation, and could not properly be made parts of a general Code. These laws only call definitely for common action, which under a federal system would fall under the control of the Federal Parliament.

The Present Opportunity.—The present time seems auspicious for undertaking this task, if it should be undertaken. On the conclusion of the present war, which will apparently involve the annexation of the two Republics, there will undoubtedly be a period of Crown Colony or military government. And the laws of the Transvaal will certainly call for scrutiny by the light of the Convention, which many of them are said to violate. During the period which must elapse before representative government is re-granted, there would be an admirable opportunity of constituting an efficient commission, constituted of lawyers versed alike in South African and English Law, and possibly also in the Law of Scotland, which is probably much nearer to that of Holland than our own. This commission could frame, for use in the Orange River and the Transvaal, codes agreed in consultation with lawyers of the Cape and Natal, with reference to such subjects as we have indicated, and probably as to other subjects. There is little doubt that, quite apart from any federal arrangement, such codes, if carefully framed and judiciously discussed, would be adopted by the colonies which now have autonomous government. And it is not unreasonable to suppose that the labours of such a commission would tend to what all desire, irrespective of flag—the gathering of the Europeans in South Africa into one friendly camp, and so lessen the friction now created by the Roman-Dutch ideals and methods of one half of the white population.

Note.—After this paper was in print the writer's attention was called to a paper by Sir Sidney Shippard, K.C.M.G., on the administration of justice in South Africa, published in the *Proceedings of the Royal Colonial Institute*, for 1896, 1897 (vol. xxviii., p. 81). Sir Sidney Shippard's well-known ability, and his experience as a judge in South Africa, give special weight to his opinion as to the improvement effected under English influence in the administration of justice in South Africa, and by legislation which has removed some of the more inconvenient relics of Roman-Dutch Law; and it will be found that he considers that in certain directions South Africa would greatly gain by a still further adoption of English substantive law, especially in criminal and commercial matters.

APPEALS UNDER THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT.

[*Contributed by* A. R. Butterworth, Esq.]

Regulations as to Appeals.—The Commonwealth of Australia Constitution Act having now become law, it may be useful to consider the effect of those provisions of the Act which relate to appeals, and to contrast them with the previous law regulating appeals from the Australian Colonies, and with the original provisions of the Bill transmitted to England by the federating colonies, and also with the law regulating appeals from Canada. In order to do this it is necessary to examine in detail some of the provisions of the original Bill and also of the Act, especially those contained in s. 74, which have recently led to much discussion and negotiation.

By s. 73 of the Constitution Act the High Court will have jurisdiction to hear appeals from all judgments, decrees, orders, and sentences of the Supreme Court of any State, "and the judgment of the High Court in all such cases shall be final and conclusive."

Art. 74 of the Draft Bill,[1] transmitted to England by the five federating colonies—*viz.* New South Wales, Victoria, South Australia, Queensland, and Tasmania—was in the following form:

74. **Appeals to Queen in Council.**]—No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a State, are involved.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But the Parliament may make laws limiting the matters in which such leave may be asked.

Indefiniteness of Clause 74.—The vague terms of this Clause laid it open to serious objection, the main grounds of which are very clearly stated in a memorandum, dated March 29, 1900, setting out the objections of the

[1] This Bill is printed in the present volume of this Journal, *ante*, pp. 151-172; s. 74, at p. 164.

Government to some provisions of the Bill.[1] The following among other grounds of objection are there pointed out:

It is impossible to say what construction would be placed on this Article when it comes to be judicially interpreted. There may be large classes of cases just on the border-line with regard to which it cannot be predicted whether they, do or do not involve the interpretation of the Constitution.

It may fairly be argued that any question as to the validity of the exercise of legislative powers by the Legislature of the Commonwealth is a matter involving the interpretation of the Constitution. Questions may arise whether legislation under any of the powers mentioned in paragraphs i., ix., x., xix., xx., xxvi., xxvii., xxviii., xxix, xxx., xxxvii., and xxxviii. of Art. 51[2] of the Constitution is or is not *ultra vires*, and any such legislation may involve matters affecting foreigners and foreign ships in Australia and in Australian waters and their Treaty rights. Yet as the clause stands there would be no right of appeal from the High Court to the Privy Council in such cases.

* * * * * * *

A grave objection to Art. 74 is the absence of any definition of the class of cases in which "the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a State [are involved]."

Does this phrase include the interests of a large class of persons in Her Majesty's dominions—say of investors in Australian securities, or of a body of shareholders in an industrial undertaking formed, say, in the United Kingdom, to carry on some great commercial enterprise in Australia—or is it confined to cases in which the interests affected are only those of the government of other parts of Her Majesty's dominions?

If the latter is the true meaning, the proviso would have little or no operation. If the former, no task can be conceived more difficult than that of deciding whether or not the condition of the Article has been satisfied.

The view taken in the Memorandum of the delegates is that the prerogative of granting leave to appeal to the Privy Council from the Supreme Courts of the several colonies is unaffected, and that Art. 74 only applies to appeals from the High Court of the Commonwealth.

This is very doubtful, and is only one of the many difficult questions of construction which would arise upon this Article. The Article appears to have been framed under the impression that the only appeal from the Supreme Courts of the Colonies was to be to the High Court of the Commonwealth, and its effect upon the right of Her Majesty to grant leave to appeal to the Privy Council from the judgments of Supreme Courts of the Colonies is problematical.

If, however, the view taken by the Delegates on this point be correct, the result will be that in a Constitutional case a litigant defeated in the Supreme Court of a State might appeal at his option either to the High Court of the Commonwealth or to the Privy Council. The successful party might prefer the latter, but would have no choice.

Again, if the Delegates' view as to the construction of the Article is correct, in the case of a decision by a Superior Court with which neither litigant is satisfied, there may be cross appeals, one by one party to the High Court, and the other by the other party to the Privy Council. The decisions of both of these Courts

[1] Printed in *Further Papers relating to the Federation of the Australian Colonies*, May, 1900 (Cd. 158), pp. 24 *et seq.*

[2] See Art. 51, *infra*.

may be final; and if they happen to disagree, it is difficult to see what will be the consequence.

Further, under Art. 74, it would in many cases be possible for a litigant to present a Petition to the Queen in Council for special leave to appeal, on the ground either that the question at issue did not involve the interpretation of the Constitution, or that public interests were involved, and on this Petition there would be a preliminary argument on either or both of these points.

To pass this Article in its present form would be to introduce confusion and uncertainty in a matter in which it is desirable above all others that there should be clearness and certainty. The difficulty of construing it forms an insuperable obstacle to its adoption by the Imperial Parliament without modification or some overriding clause in the Bill to control its operation.

Variety of Matters for Interpretation.—A perusal of s. 51, which confers on the Federal Parliament powers of legislation, is necessary to enable one to realise the large number of matters likely to arise which will involve "the interpretation of this Constitution," while such a perusal makes it evident that many difficult questions may be raised as to whether legislation is or is not *ultra vires* under other paragraphs than those specified in this memorandum.

The section is as follows:

51. **Legislative Powers of the Parliament.**]—The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) Trade and commerce with other countries, and among the States:
(ii) Taxation; but so as not to discriminate between States or parts of States:
(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
(iv) Borrowing money on the public credit of the Commonwealth:
(v) Postal, telegraphic, telephonic, and other like services:
(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
(vii) Lighthouses, lightships, beacons, and buoys:
(viii) Astronomical and meteorological observations:
(ix) Quarantine:
(x) Fisheries in Australian waters beyond territorial limits:
(xi) Census and statistics:
(xii) Currency, coinage, and legal tender:
(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money:
(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
(xv) Weights and measures:
(xvi) Bills of exchange and promissory notes:
(xvii) Bankruptcy and insolvency:
(xviii) Copyrights, patents of inventions and designs, and trademarks:
(xix) Naturalisation and aliens:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto parental rights, and the custody and guardianship of infants:

(xxiii) Invalid and old-age pensions:

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States:

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

(xxvii) Immigration and emigration:

(xxviii) The influx of criminals:

(xxix) External affairs:

(xxx) The relations of the Commonwealth with the islands of the Pacific:

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

(xxxiv) Railway construction and extension in any State with the consent of that State:

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The Appeal Section as Passed.—Meanwhile, after much negotiation, s. 74 has been passed in the following form:

74. **Appeal to Queen in Council.**]—No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question howsoever arising as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Scope and Operation of Section.—It will be seen that this section has removed several of the difficult questions of construction which would have arisen on the original clause, and that it shows a marked improvement upon that clause in clearness and certainty. The expressions "any matter involving the interpretation of this Constitution," or involving "the public interests" of some other part of the Queen's dominions, have disappeared. As the section expressly deals only with appeals from the High Court, it is clear that it does not directly affect appeals from the Supreme Court of any State. It is considerably less restrictive than the original clause, for many questions may arise "involving the interpretation of this Constitution or of the Constitution of a State," which under that clause would not have been subject to appeal, but with regard to which appeals will not be prohibited under the present section, unless they come in the category of questions, "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States." Even in these latter cases the High Court may "for any special reason" allow an appeal to the Privy Council, while in all cases not in this category special leave to appeal may be granted by the Privy Council. Again, the words "*inter se*" would still appear to limit the restriction to cases in which "the public interests"—if by that expression was meant the interests of the Government—of some other part of Her Majesty's dominions are not involved. The section, however, though less restrictive than that originally proposed, will stand as the first enactment on the English Statute Book, expressly limiting the prerogative right of the Queen in Council to hear the complaint of a British subject appealing to the Throne for a redress of grievances.

The power which it was proposed by the original Clause 74 to confer on the Federal Parliament to "make laws limiting the matters in which special leave to appeal may be asked, is granted by the present section, but its effect will, perhaps, be minimised by what is intended as a safeguard to the exercise of this power by providing that "proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

Its Defects.—Although by the amendment of Clause 74 several of the objections stated in the Memorandum of March 29, 1900, have been met, some apply to the section in its final shape. Under this section not

only in a Constitutional case (as put in the Memorandum), but in all cases whatever which involve more than £500, a litigant defeated in the Supreme Court of a State will now have the option of appealing either to the High Court or to the Privy Council direct. The successful party will have no choice, the selection of the appellate tribunal resting entirely with the unsuccessful party who appeals. It is in this indirect way that s. 74 materially affects the right of appeal from the Supreme Court of a State to the Privy Council; for the right of an appellant to appeal to the Privy Council has hitherto involved the correlative right of the respondent not to be deprived of the benefit of a judgment in his favour by any tribunal other than the Privy Council. In other words, under the law which has hitherto prevailed, a party who has recovered judgment in the Supreme Court of a colony in an ordinary action could not be deprived of that judgment in his favour unless his opponent appealed to the Privy Council and got the judgment reversed; but under the new law his opponent may elect to appeal to the High Court, and if that Court reverse the decision, the party originally successful will be deprived of the benefit of the judgment without there being any appeal to the Privy Council; for unless the case belongs to that limited class in which the Privy Council will grant special leave to appeal, the judgment of the High Court will, under s. 73, be "final and conclusive."

Appeal as of Right or by Special Leave: Distinction.—The distinction between a right of appeal, such as has hitherto existed from the judgment of a Supreme Court in all cases involving more than £500, and a liberty to apply to the Privy Council for special leave to appeal, such as is afforded by this Act from the judgment of the High Court in some of such cases, is a distinction which, though frequently overlooked, is one of the greatest practical importance. In the former case an appeal can be brought as of right, subject merely to the appellant making an application to the Supreme Court within the time limited and to his giving security for due prosecution of the appeal and payment of costs if awarded. Where, however, an application has to be made to the Privy Council for special leave to appeal, such leave will be refused in all ordinary cases, and will in no case be granted, according to the rules laid down in the well-known decision in *Prince* v. *Gagnon* [1882], "save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character,"[1] and even in such a case leave to appeal will not necessarily be granted. "Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition."[2]

[1] L.R. 8 App. Cas. 103, at 105.

[2] Judgment of the Judicial Committee delivered by Lord Watson in *La Cité de Montréal* v. *Les Ecclésiastiques de St. Sulpice* [1889], 14 App. Cas. 660, at 662.

The present Act therefore confers no general right of appeal from a decision of the High Court, such as has hitherto existed with respect to a decision of a Supreme Court. It merely enables an aggrieved party in an exceptional and comparatively rare class of case to obtain from the Privy Council special leave to appeal, and in certain other cases it empowers the High Court, "if satisfied that for any special reason the certificate should be granted," to certify that the question should be determined by the Privy Council.

Mode of Exercising the Power.—Whether this latter provision will give satisfaction or not must largely depend upon the mode in which the High Court exercises this power. It is not difficult to foresee cases in which grave dissatisfaction would be caused if the High Court were to refuse the certificate. Suppose, for instance, in a case falling within the first paragraph of s. 74, a company carrying on business in New South Wales were to bring a suit in equity in the Supreme Court of that colony for an injunction to restrain an officer of the Federal Government from enforcing some law alleged to be *ultra vires*, the Chief Judge in Equity might grant the injunction. On appeal to the full Court, constituted of the Chief Justice of New South Wales and two other Judges, the decision might be unanimously upheld. The defendant might appeal to the High Court, constituted of the Chief Justice of the Commonwealth and two other Judges. The former might approve of the decision, but his two colleagues might disapprove, and a decision against the Government approved by five Judges might be reversed by two. The case might be one arousing strong political feeling; but whether a certificate allowing an appeal in such a case to the Privy Council should or should not be granted would depend upon whether the two latter Judges were or were not "satisfied that for any special reason" it should be granted.

Original Jurisdiction of High Court.—The right of appeal from a Supreme Court will be further affected by reason of the original jurisdiction conferred by s. 75 on the High Court in certain matters, including matters "between States, or between residents of different States, or between a State and a resident of another State"; while by s. 76 the Federal Parliament is empowered to make laws conferring original jurisdiction in certain other matters; and by s. 77 with respect to the matters mentioned in ss. 75 and 76, the Parliament may make laws "defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is vested in the Courts of the States."[1] Hitherto, if a cause of action involving, say, £1000 arose wholly in New South Wales against a resident of Victoria, the latter might be sued in New South Wales, and either party had a right of appeal to the Privy Council. Under the Act, the High Court will have original jurisdiction in such a case; and if the plaintiff

[1] See Clauses 75, 76, 77 of the Bill, which have been passed without amendment, printed *ante*, pp. 164, 165.

elects to bring his action in that Court, there will be no appeal as of right (except indeed an appeal from a Justice of the High Court to the full Court),[1] and unless the case be of a very special character, it will be useless, as has been seen, to apply to the Privy Council for special leave to appeal.

Moreover, in the future it will be competent for the Federal Parliament to entirely oust the jurisdiction of the Supreme Court of a State in all such cases by declaring that the jurisdiction of the High Court shall be exclusive.

Cross Appeals.—S. 74 of the Act is open to another objection urged against the original clause—*viz.* that where a case is brought in the Supreme Court of a State, if neither party is satisfied with the decision of that Court, there may be cross appeals, one by one party to the High Court, and the other by the other party to the Privy Council.

Canadian Appeals.—With regard to the latter objection, and also to the objection that to the unsuccessful party is given the option of selecting the appellate tribunal, it may be observed that the same objections apply to the law now regulating appeals from Canada. There, too, the successful party in the Provincial Court has been deprived of the right which he formerly possessed of retaining the benefit of a judgment in his favour unless it were reversed by the Privy Council; there the option of selecting the appellate tribunal lies with the defeated litigant; and there, too, cross appeals may be brought by one party to the Supreme Court of Canada, and by the other party to the Privy Council.[2]

This arrangement, although now extended to Australia, seems to fall considerably short of ideal excellence, and would appear not easy to defend on principle.

With regard to Canada it has been said:

> This double appeal, which exists as a matter of statutory right, may seem an anomaly, but in practice no difficulty has resulted from it. The statement that the judgment of the Supreme Court of Canada is final is subject to some qualification. . . . An appeal may be allowed to the Privy Council from the judgment of the Supreme Court of Canada . . . and in fact many such appeals have been allowed, not as a matter of statutory right, but of grace. The exercise of

[1] See s. 73 (1), *ante*, p. 164.

[2] In *The City of Montreal* v. *Devlin* [1878], 22 Lower Canada Jurist 136, the Court of Queen's Bench at Montreal decided that leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, must be granted upon the application of one party to the suit, notwithstanding that the adverse party had previously obtained leave on application to another Judge in Chambers to appeal from the same judgment to the Supreme Court of Canada. Whatever might be the inconveniences resulting from the allowing in the same case of a double appeal to two separate tribunals, whose decisions are each held by law to be supreme and final, the Court could not refuse to grant the appeal to the Privy Council, being equally bound so to do by the precise text of the law, as was the Judge in Chambers to allow the appeal sought for to the Supreme Court. In this particular case, however, the parties to the suit finally came to a compromise, so that neither appeal was prosecuted.—Todd's *Parliamentary Government in the British Colonies*, 2nd ed. (1894), pp. 309-10.

the prerogative in this direction would therefore prevent any evil which might be threatened from conflicting judgments. Further, it may reasonably be assumed that in the event of concurrent appeals being taken, the Supreme Court would withhold its decision pending the result of the appeal to the Privy Council.[1]

It appears, then, that the law which will in future regulate appeals from the Supreme Courts of the federated States and from the High Court of Australia bears a very close resemblance to that which regulates appeals from the Provincial Courts and from the Supreme Court of Canada. The appealable amount in the case of several of the provinces is, however, smaller than in the case of the Australian States,[2] and there is no legislative restriction on the prerogative right of the Queen to grant special leave to appeal from any decision of the Supreme Court of Canada.[3] By a Dominion Act of 1891, important questions of law or fact touching, among other matters, provincial legislation, or "the constitutionality of any legislation of the Parliament of Canada," may be referred by the Governor in Council to the Supreme Court for hearing or consideration; and it is expressly provided that "the opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between parties."[4]

Summary of Differences.—The main points of difference which have now been discussed may be summarised as follows:

1. Under the law hitherto prevailing in the Australian colonies, a litigant in any action involving more than £500 had a right to appeal to the Privy Council from any final judgment, decree, or order of the Supreme Court, subject to his applying to the Supreme Court within fourteen days, and to his giving security for due prosecution of the appeal and payment of costs if awarded. In other respects, it was an absolute right to appeal of which he could not be deprived. Special leave to appeal might be granted by the Privy Council in cases where less than £500 was involved.[5]

2. Under the Bill as transmitted to England, a litigant in an action in the Supreme Court involving more than £500 would, it seems, have had the option of appealing either to the High Court or to the Privy Council direct; and if neither party were satisfied, one might appeal to the High Court and the other to the Privy Council direct. If the only appeal made were to the High Court, the decision of the High Court was to be "final and conclusive," and neither party could then appeal

[1] Memorandum from Mr. R. Cassels, Registrar of the Supreme Court of Canada, cited in Mr. Todd's work, *ibid.*, p. 310.

[2] In five out of the eight provinces an appeal to the Privy Council lies in cases involving more than £300, in two others £500, and in Ontario $4,000. See the Table of Conditions of Appeal to the Privy Council contributed by Mr. A. Wood Renton to this Journal, N.S., Vol. I., pp. 360-62.

[3] Such right is expressly saved (*Rev. Stat. Can.*, 1886, No. 135, s. 71).

[4] 54 & 55 Vict., c. 25 (Can.), s. 4.

[5] Cf *Sun Fire Office* v. *Hart* [1889] 14 App. Cas. 98.

from such decision to the Privy Council as a matter of right. Either party might, however, except in cases prohibited by Clause 74, apply to the Privy Council for special leave to appeal, and if the case belonged to the limited class of cases referred to in *Prince* v. *Gagnon*, such leave might be granted. But by Clause 74 no appeal was to be permitted "in any matter involving the interpretation of this Constitution or of the Constitution of a State unless the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a State, are involved." Whether this latter prohibition would have been limited to appeals from the High Court, or would have also extended to appeals from the Supreme Court of a State, was left in doubt.

3. Under the Act as passed, a litigant in such an action will have the option of appealing to the High Court or to the Privy Council direct; and if neither party be satisfied, one may appeal to the High Court and the other to the Privy Council direct. If the only appeal made be to the High Court, the decision of the High Court will be "final and conclusive," and no appeal will lie from the decision of that Court as of right. Either party may, however, except in cases prohibited by s. 74, apply to the Privy Council for special leave to appeal, and if the case belongs to the limited class of cases referred to in *Prince* v. *Gagnon*, such leave may be granted, although less than £500 may be involved. But by s. 74 no appeal shall be permitted from a decision of the High Court upon any question "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court," upon being "satisfied that for any special reason the certificate should be granted," "shall certify that the question is one which ought to be determined by Her Majesty in Council."

4. In Canada, as in Australia, a litigant has the option of appealing, in a case involving an appealable amount, from the Provincial Court to the Supreme Court of Canada or to the Privy Council direct; and if neither party be satisfied, one may appeal to the Supreme Court and the other to the Privy Council direct. If the only appeal made be to the Supreme Court of Canada, the judgment of that Court shall be "final and conclusive";[1] but either party may apply to the Privy Council for special leave to appeal, which will be granted only in the class of case already referred to.

NOTE.—The Draft Federation Bill transmitted to England by the five federating colonies, which is printed in this volume of the Journal, was, after various amendments made by the Government, introduced in the House of Commons on May 14, 1900, and after further amendment was read a third time on June 25. It was brought into the House of Lords on June 26, and

[1] *Rev. Stat. Can.*, 1886, c. 135, s. 71.

without further amendment passed its third reading on July 5, and received the Royal Assent on July 9.

The amendments made in the Bill, as printed *ante*, pp. 151-72, are as follows:

Page 151. Title: *omit* "Draft of a Bill" *and insert* "An Act."

[9th July, 1900] Preamble, line 1: *after* "people of" *insert* "New South Wales, Victoria, South Australia, Queensland, and Tasmania."

Clause ii., line 1: *omit* "This Act shall bind the Crown, and its provisions" *and insert* "The provisions of this Act."

Page 152. Clause iii., line 3: *after* "people of" *insert* "New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia."

Clause vi., line 3: *omit* "'Colony' shall mean any colony or province."

Page 164. Clause lxxiv.: *omit the whole clause as printed, and insert* "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question howsoever arising as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

"The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Conncil. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

COMPARATIVE LEGISLATION IN BANKRUPTCY.[1]

[*Contributed by* Professor Richard Brown.]

On a former occasion, when privileged to address a Glasgow audience, I traced the historical development of the bankruptcy laws of England and Scotland. I now propose to examine the bankruptcy laws of our own and other countries as they presently exist, so that by comparison we may lay a foundation for an estimate of their relative merits and defects.

"Bankruptcy": Traders and Non-traders.—I use the word "bankruptcy" in its generic sense as including insolvency in every form, but it is well to remember the great diversity in the use of the term. Literally, "bankrupt" means a ruined trader—one whose table or counter of business is broken up (*banco rotto*)—and, in the earlier systems of law, the advantages and disadvantages of bankruptcy proceedings were confined to such persons. Thus, in England no notice was taken by the Legislature of the insolvent who was not a trader. He was left to be dealt with by the Common Law, and especially the Law of Imprisonment for Debt, until humanity intervened in the interests of the unfortunate. Hence arose a double system—that of bankruptcy, applicable to traders, and that of insolvency, embracing all outside the mercantile pale. Each had its separate court and officials until the two were merged, in 1861. Even after that date, the distinction, in a minor form, was kept up, until it was finally and completely abolished by the existing English Act of 1883.

Scotland derived much of its Common Law of debtor and creditor from France, where the distinction between trader and non-trader was always well marked, and still exists. But the statutory laws of insolvency in Scotland and France were, after some early superficial resemblance, developed on different lines. The Scottish Statutes of 1621 and 1696, with which we are familiar, were directed equally against insolvents and bankrupts. In both Acts "dyvour" and "bankrupt" are used as interchangeable terms, and there is no trace of any special treatment in respect of the debtor's occupation. Dyvour and bankrupt had equally the benefit of the Common Law of Cessio Bonorum, which was almost identical with that of France. The first statutory law of distribution or sequestration in Scotland was that

[1] An address delivered before the Glasgow Chartered Accountants' Students' Society.

of 1772, and, like the older Acts mentioned, it was not confined to traders. Shortly afterwards, however, the influence of the English system became manifest. The Sequestration Act of 1783 was confined to traders, and the non-trader continued subject to imprisonment, modified only by the Common Law of Cessio Bonorum. Subsequent Acts contained elaborate definitions of "mercantile persons" to whom the Act should apply. S. 5 of the Act of 1839 follows the English model of the time, in attempting a complete enumeration of the trading community. No less than twenty-seven trades are specially mentioned as coming within the operation of the Act. All this was abolished by our existing Statute of 1856, so that Scotland was, in this particular, in advance of England by nearly thirty years.

France, and nearly every country on the Continent of Europe, except Germany, still retain the distinction between trader and non-trader. The German Bankruptcy Code of 1877 discriminates between fraudulent bankruptcy and simple failure, but the non-trader may be included in either class. The United States had not, until last year, any general law of bankruptcy, each State being left to deal with the matter for itself; but the Act of Congress of 1898 applies to all classes. On the other hand, the Parliament of Canada, in exercising in 1875 the power reserved to it by the Dominion Constitution of making bankruptcy laws, took for its model one of the older English Acts, and enumerated no less than thirty-seven kinds of traders. This species of legislation, however, was not appreciated, and in 1880 the whole Act was swept out of existence, and now, as formerly, each province deals with debtors according to the discretion of the local Parliament. The Australasian Colonies are not yet consolidated, but nearly all have bankruptcy Statutes on modern English lines and applicable to all persons. It may be noted that, though the abortive Canadian Statute dealt only with traders, it was called "An Act respecting Insolvency." With greater consistency, the majority of the Australasian Statutes are titled "Insolvency" Acts, and the word is defined to include bankruptcy. The exceptions are New South Wales and Tasmania, but in each case "bankruptcy" is defined to include insolvency where used in any other Statute in force.

Within the limits of a single lecture, my remarks on this wide subject must be of a very general character. The method of treatment which suggests itself is first to find out what a bankruptcy law ought to be, and then to explain the leading systems, that we may judge how far each corresponds with our ideal.

The Objects of Bankruptcy.—Bankruptcy may have for its object (1) the punishment of the fraudulent debtor; (2) the reinstatement of the unfortunate but innocent debtor; or (3) the equitable distribution of the insufficient assets among all the creditors. All of these objects may be combined in one system, yet the relative importance given to each may determine the class and character of the legislation.

(i) *Salus Reipublicæ.*—The punishment of the fraudulent debtor very properly commends itself to public attention, but what is the object in view, and in whose interest is the punishment inflicted? The object is clearly the moral health of the community—the comfort and prosperity of the whole people. Every civilised country punishes fraud, and has established at public cost a judiciary and a criminal organisation for the punishment of this and other crimes. The object is not to recompense the sufferer—far less is it the gratification of the vindictive feelings of the person or persons injured. It is the prevention of future crimes by the same person, and, more particularly, the prevention of similar crimes by others, who may be deterred from criminal acts by the certainty of subsequent punishment. It is a *public* advantage, and it is therefore manifestly unjust that any section of the public should defray the whole cost. Creditors who have already lost money through the fraud of their debtor, and who, being warned, are less likely than others to be again sufferers from the same cause, receive no special benefit from the judicial process, and should not be asked to pay any larger proportion of the cost of conviction and punishment than their neighbours who have not suffered from this particular criminal act. Yet this is the effect in every case where punishment of the debtor is made to form part of a bankruptcy system, and where the already insufficient assets are further diminished by expenditure in the public interest. We may therefore set aside the view that punishment of the bankrupt can justly be included among the objects of a bankruptcy law.

(ii) *Rehabilitation of Debtor.*—We now turn to the second branch of our enquiry, and ask whether the release of the debtor from his unfulfilled obligations is of sufficient importance to form a leading feature of a law of bankruptcy. Humanitarian sentiment led, as we have seen, to the Insolvent Code of England. Thus the Preamble of the Insolvent Debtors Act of 1772 (12 Geo. III., No. 23) recites that "many persons, by losses and other misfortunes, are rendered incapable of paying their whole debts, and though they are willing to make the utmost satisfaction they can, and many of them are able to serve his Majesty by sea or land, yet are detained in prison by their creditors, or have been forced to go into foreign parts, and such unhappy debtors have always been deemed the proper objects of public compassion." There is here set forth a *public* feeling antagonistic to the rights derived from obligation, and a *public* loss through the debtor being unable to serve in the army or navy. Similar sentiments are to be found in the messages to Congress of the American presidents. The Constitution of the United States reserved to Congress the power to make general bankruptcy laws superseding the State laws; but, as we shall see, this constitutional right was only spasmodically exercised, and only for very short periods. In the absence of any national Code of Bankruptcy, the chaotic character of the State laws was frequently commented on by successive presidents. Thus in 1825 President Adams wrote: "To conciliate the

claim of the individual citizen to the enjoyment of personal liberty with the effective obligations of private contracts is the difficult problem to be solved by a law of bankruptcy. These are objects of the deepest interest to society, affecting all that is precious in the existence of multitudes of persons, many of them in the classes essentially dependent and helpless."[1] I took occasion, in a lecture delivered in June of last year,[2] to sketch the history of the Law of Debtor and Creditor, and to show that the Common Law of Cessio Bonorum in Rome and France and Scotland mitigated to a large extent the evils of imprisonment for debt complained of in the legal history of England and America. But imprisonment for debt, where unaccompanied by fraud or some statutory offence of a similar nature, is now almost universally abolished. The State of New York led the way in 1831, and before 1844 at least eighteen separate States had followed the example. The rule is now universal throughout the United States. France abolished imprisonment (except for special offences) in 1867, England in 1869, Belgium in 1871, Ireland in 1872, Norway and Switzerland in 1874, Italy and Sweden in 1877, Russia in 1879, and Scotland in 1880. Imprisonment for debt is also abolished in all the provinces of Canada and in all the colonies of Australia. Germany still retains imprisonment, but it is limited to six months, and the debtor is set at liberty on his making a declaratory oath.[3] I have mentioned these facts to show that arguments for a bankruptcy law, founded on public sympathy and upon the loss of the services of the debtor to his family and to the State, can no longer be maintained. But in certain quarters, especially in America, it is urged that a bankruptcy or insolvency law should have for one of its main objects the reinstatement of the debtor in the full rights of citizenship, untrammelled by the burden of debt. Bankruptcy, it is urged, relates as much to the *status* of the individual as to the distribution of his estate. "The contractual relation in which a debtor stands towards his creditors is a part of his *status*," and the courts of the country of a debtor's domicile should have power to alter or restore this *status* on grounds of public policy, irrespective of any supposed rights of creditors.[4] It will serve no purpose to criticise this view, for it is obvious that no system of bankruptcy is required for the mere purpose of dissolving the legal obligation of a debtor to his creditors. The English Insolvency Acts, when they existed, were no doubt provided as a substitute for the power of unlimited imprisonment; but their elaborate provisions were directed towards preserving the legitimate interests of the creditors, and towards distributing the assets equitably among them.

(iii) *Equitable Distribution of Assets.*—We are thus brought by a process of exhaustion to the third, and, since the abolition of imprisonment for debt, the only real object to be served by a bankruptcy statute. At Common Law, and apart from Statute, there is necessarily a race among creditors to obtain

[1] *Presidents' Messages*, vol. ii., p. 303.
[2] See *Scottish Accountant*, vol. iii., p. 27.
[3] Code of Civil Procedure, Art. 782, *et seq.*
[4] See *Harvard Law Review*, vol. vi., p. 360.

payment in full out of assets insufficient to pay every one his just proportion. There is also a danger that the bankrupt may voluntarily convey these assets to friends, and so put them beyond his creditors' reach, or that he may voluntarily favour certain creditors at the expense of the general body. The object, therefore, is to preserve the estate, such as it is, and to distribute it among the creditors in proportion to their several rights. "From the moment of failure," says Professor Bell, "the inadequate fund becomes the common property of the creditors," and "this forms the groundwork of all the peculiarities to be found in the bankrupt law."[1] "What is the object of a bankruptcy law?" asks the Attorney-General of England in introducing the English Bill of 1869. "The object," he answers, is "to collect the proceeds of the estates of bankrupts, and to distribute them among the creditors as fairly, cheaply, and speedily as possible."[2]

The United Kingdom: England.—In endeavouring to ascertain how far existing bankruptcy laws conform to these principles, I naturally take first the various sections of the United Kingdom; but as I have elsewhere[3] dealt fully with the bankruptcy systems of England and Scotland, a brief recapitulation must suffice. I may remind you that English bankruptcy has always been cumbrous and extremely expensive. Lord Eldon said of it in 1801 that "there was no mercy to the estate; nothing was less thought of than the object of the commission; as the statutory proceedings were frequently conducted they were little more than stock-in-trade for the commissioners, the assignees, and the solicitor."[4] In 1831 Lord Brougham introduced what was supposed to be a great reform, but after thirty years' experience it was described in the House of Commons as "an utter and disgraceful failure."[5] The salaries and allowances of the judges, the commissioners, the official assignees, and the messengers, amounted in 1859 to upwards of £82,000, all which was paid by the creditors. In 1861 another change was made, in which it was attempted to get rid of some of the officialism, and to introduce parts of the Scottish system, which the Attorney-General admitted had "worked extremely well."[6] The new Act, however, was scarcely an improvement. Its subsequent career justified the criticism of Mr. Bovill in the course of the debate that "it touched upon almost every point of the bankruptcy law, and introduced amendments upon almost every one, yet practically and substantially it left the old law in force."[7] In 1869 a more drastic change took place in the Consolidation Act of that year. The Government of the day were urged to give the Scottish system a trial in a more complete form, and they accordingly attempted to do so, and thought they had succeeded. The Attorney-General said that "the great merit of the Scotch system was its simplicity; the absence of officialism;

[1] Com., i. 8.
[2] *Hansard*, vol. cxciv., p. 777.
[3] See *Scottish Accountant*, vol. ii., p. 135.
[4] 6 Ves. 1.
[5] *Hansard*, vol. clxi., p. 420.
[6] *Ibid.*, vol. clvii., p. 660.
[7] *Ibid.*, vol. clxi., p. 421.

allowing the creditors to administer the estates in bankruptcy by themselves and in their own way without interference, and with only the necessary supervision of the Court and the separation of the administrative and judicial functions."[1] But the new Act only bore a superficial resemblance to the Scottish system. Bankruptcy was still loaded with pensions and compensations, generous salaries, and enormous law costs, all of which were paid out of the creditors' money. A specific majority of the creditors might now by a side channel, outside of bankruptcy, secure the whole management to themselves, and the comparative cheapness of this process of liquidation naturally led to its being greatly favoured at the expense of bankruptcy. The loss of the fees to bankruptcy nearly led to the bankruptcy of the whole system. Moreover, the liquidation proceedings trampled on the rights of minorities and offered a door to abuses and fraud. A friendly, and perhaps collusive, majority of creditors could whitewash an insolvent and re-establish him in business without any public enquiry, and without regard to the reasonableness of the arrangement. After a trial of fourteen years the system was condemned, and the whole bankruptcy law of England was again subjected to radical change. The existing Act of 1883, introduced by Mr. Chamberlain, was a return to extreme officialism. In introducing the Bill Mr. Chamberlain stated the two leading objects of bankruptcy to be (*first*) the improvement of the tone of commercial morality and the promotion of honest trading, and (*second*) "the fair and speedy distribution of the assets among the creditors whose property they are." The order of sequence is Mr. Chamberlain's own. "Prevention," he said, "is better than cure. The duty of Parliament is not only to protect the salvage, but also to diminish the number of wrecks."[2] This argument is glaringly opposed to the construction I have put upon the true objects of a bankruptcy system. As I have elsewhere said, Mr. Chamberlain's Act "is a Public Health Act, but it differs from all other such Acts in respect that the expense of purification is charged neither to the wrongdoer nor to the public, but to a section of innocent sufferers."[3] The expense to the creditors still continues great. From the Judicial Statistics, I estimate the average cost of a bankruptcy in England to be about 32 per cent. of the realised assets, as against 12 per cent. in Scotland.

Scotland.—Bankruptcy in Scotland has had a very different history. In the form of a system for the preservation and distribution of assets it had no existence before 1772, but the subsequent development was by way of evolution, not of violent transition. The words of Bell in 1826 form a complete justification of the temporary nature of the early bankruptcy Acts. They were experimental Statutes. "Instead of attempting at once to form a complete system, the process," says Bell, "has been slow and gradual, no improvement having been adopted till the course of experience naturally

[1] *Hansard*, vol. cxciv., p. 777
[2] *Ibid.*, vol. cclxxvii., p. 817.
[3] *Scottish Accountant*, vol. ii., p. 244.

led to it."[1] An eminent American writer says of the Scottish system that it has "attained great excellence by a slow and gradual course of improvement, suggested in the course of practice, and with the aid of combined wisdom of lawyers of profound knowledge and merchants of large views and great experience."[2] Among the lawyers of profound knowledge who early in its history devoted themselves to this subject, Bell himself has a foremost place. He drafted a complete Code of Bankruptcy, which, although only partially adopted in the Act of 1839 (2 & 3 Vict., No. 41), still forms a mine of sound principle from which much useful matter has since been extracted, and which is by no means yet exhausted. It may interest you to know that on one occasion the Scottish bankruptcy system ran great risk of being absorbed in that of England. The undoubted advantage, other things being equal, of a uniform system of bankruptcy throughout the British Isles, led in 1852 to the formation of a London committee of merchants, who employed English lawyers to draft a Bill professing to extract the best features of both systems. It was submitted to Lord Brougham, who was still enamoured of his legislative achievement of twenty years before, and who readily undertook its promotion in Parliament. The committee employed a special emissary—a Mr. Gilmour—to come down to Scotland to persuade our merchants and lawyers and accountants that the new production was perfect. Fortunately the Scottish public realised in time that it was a reproduction of English official bankruptcy in its worst form. Petitions poured into Parliament from all the leading professional and mercantile bodies in Scotland pointing out the disastrous consequences of allowing the Bill to pass into law. Lord Brougham refused to recognise these as of any weight, and in the session of 1854 pressed his Bill with the vehemence of a violent partisan. The merchants, he said, were misled by interested lawyers and accountants. "An accountant," he said, "meant a man who could give no other account of himself."[3] He snarled at the suggestions of the Lord Chancellor and others, that in face of the opposition he should withdraw his Bill, but on a subsequent occasion he yielded to the extent of taking time to consider. Consideration, and perhaps outside pressure, had their effect, and the Bill was allowed to die a natural death. I may remind you that Lord Brougham's Act of 1831, which it was practically proposed to extend to Scotland, was a gigantic structure of officialism. It included a special Court of Review, the Chief Judge of which had £3000 per annum, the other judges £2000 each, and the commissioners £1500 each. It had also a host of official assignees, and a numerous staff of registrars, accountants, taxing-masters, messengers, clerks, and other officers, all specially attached to the Bankruptcy Court. On the other hand, it is one of the distinguishing features of Scottish bankruptcy that it has no special bankruptcy officials. The ordinary Courts

[1] Bell's Com., i. 17.

[2] Kent s Com., 14th ed., ii. 393, *note*.

[3] Hansard, vol. cxxxii., p. 1394.

and officers efficiently undertake all the routine work. For a time we had an "Accountant in Bankruptcy" to supervise and control the trustees appointed by the creditors, but in 1889 it was found that even this office could, without any loss of efficiency, be combined with that of "Accountant of the Court of Session" (52 & 53 Vict., No. 39).

I have been led to show the bright side of Scottish bankruptcy because in some important respects it stands out clearly against the shadows of a neighbouring system. But it is not by any means perfect. In the first place, it wants consolidation, so as to embrace in one Act the whole law of insolvency, including reduction of preferences and the avoiding of gratuitous alienations. It should also embrace within itself a provision for small bankruptcies, as in the English system. At present an attempt is made to meet this requirement by an adaptation of the now antiquated process of Cessio Bonorum, but this process was instituted for an entirely different purpose, and the old framework distorts the new structure. Cessio Bonorum was, as we have seen, a refuge from arbitrary imprisonment, and therefore the debtor himself was invariably the petitioner. In 1880 the abolition of imprisonment for debt took away the only motive the debtor had for prosecuting the action, but, as part of the new system, he was in 1881 presented with another motive in the shape of a possible discharge. Voluntary bankruptcy in this form is therefore still occasionally resorted to, but in the great majority of cases modern Cessio is in effect the creation by creditors of an involuntary bankruptcy for the purpose of distributing the debtor's estate. When it takes this form, the initial examination of the debtor is altogether out of place. A public examination, as in sequestration, may be expedient, but in Cessio it is taken at the wrong time. To prove from the debtor's lips that he had been guilty of concealment or extravagance may be a good reason for denying him the benefit where he is himself the applicant, but it is no reason for refusing the petition of his creditors. There are, however, graver objections to Cessio as a process for small bankruptcies, such as the imperfect vesting of the trustee, the exclusion of *acquirenda*, the absence of retro-active nullities of preferences, and the want of international recognition of either decree or discharge.

Ireland.—Bankruptcy in Ireland has run a course separate from, but analogous to, that of England. The leading Act is that of 1857 (20 & 21 Vict., No. 60), at which date, it will be remembered, Lord Brougham's Act of 1831 was still in force in England. The Irish Act, like that of England, combined the previously existing Courts of Bankruptcy and Insolvency in a new Court of Bankruptcy and Insolvency, with two judges, each of whom was to receive £2000 per annum. It also provided for the usual array of registrars, official assignees, creditors' assignees, clerks, and messengers. In addition to the salaries of permanent officials, it was the duty of the Court to fix the remuneration of the official assignees, messengers, etc.; and it may be noted that even the messenger might be remunerated to the extent

of 2½ per cent. of the assets placed under his particular charge (s. 76). Very extensive changes were made by the amending Act of 1872 (35 & 36 Vict., No. 58) on the lines of the English Act of 1869, which is practically the ruling Act in Ireland at the present day. All the defects of the English Acts already pointed out are reproduced in Ireland; but recent statutory alterations have been on the right lines—*e.g.*, the establishment of local Bankruptcy Courts in 1888 (51 & 52 Vict., No. 44) and the union and consolidation of the Bankruptcy Court with the Irish Supreme Court in 1897 (60 & 61 Vict., No. 66). I have endeavoured to form an estimate from the Judicial Statistics of the average cost of bankruptcy in Ireland at the present day, with the result that Bankruptcy consumes 46 per cent. of the realised assets, Insolvency 33 per cent., and Vesting Arrangement 32 per cent. These figures are in excess of those of England, which, so far as I can discover, is, with this exception, the most expensive bankruptcy system in the world.

Dominion of Canada.—From the United Kingdom I pass in natural transition to the British Colonies, in all of which the bankruptcy law of England, in one or other of its varying forms, has served as a model. It has already been incidentally mentioned that in the Dominion of Canada there is at present no general law of bankruptcy. We may, however, glance at the provisions of the Act of the Dominion Parliament passed in 1875 and repealed in 1880. It applied, as we have seen, only to traders, trading partnerships, and trading companies. The assets were vested in the official assignee of the county or district of the debtor's domicile. The creditors might supersede the official assignee by an assignee appointed by themselves, and in this case the Court fixed the remuneration of the official assignee for his services up till the period of the creditors' appointment. The creditors had only one vote each according to number, no regard being paid to value. A discharge of the bankrupt might be voted by a majority in number and three-fourths in value of the creditors for $100, but, where the dividend was less than 33 per cent., the Court might refuse to sanction. The remuneration of the assignee, whether official or voluntary, was not to exceed the following scale—viz., 5 per cent. where the realised assets did not exceed $1000, 2½ per cent. on the amount between $1000 and $5000, and 1¼ per cent. on the amount in excess of $5000. Those rates do not seem excessive, but the costs might be considerably increased by the fees of attorney and counsel where these were employed. The non-success of the Act may to some extent be accounted for by the diversity of the previously existing provincial systems, embracing such contrasts as the English law of Ontario and the French Code which ruled at least part of Quebec. These provincial laws are again in force. In Quebec, as might be expected, the law is based on Cessio Bonorum, but a creditor holding an unsecured claim of $200 and upwards can require a trader to make an abandonment. A curator is then appointed by the Superior Court

to administer the estate, but there is no provision for the discharge of the insolvent. In Ontario the debtor may make an assignment to the sheriff of the county in which he resides or carries on business; or, with the consent of a majority of his creditors having claims of $100 or upwards, he may make an assignment to any other person resident in Ontario. Provision is made for a *pro-rata* distribution among the creditors. The mode in which the creditors vote resembles that with which we are familiar in company law. Thus, for a claim between $100 and $200 the creditor has one vote; between $200 and $500, two votes; between $500 and $1,000, three votes; and for every $1,000 beyond, an additional vote.

Victoria.—We now cross the globe to the Australasian Colonies, nearly all of which have elaborate codes of bankruptcy practically embodying the English system. The colony of Victoria revised, repealed, and re-passed all its leading Statutes in 1890, so that the principal Act now in force is called the "Insolvency Act, 1890." This, however, is mainly a reproduction of the Insolvency Act, 1871, which, in turn, is the English Act of 1869 with adaptations and improvements. In some cases the terminology is different. "Bankruptcy" becomes "insolvency," the Scottish word "sequestration" takes the place of "adjudication," and the words "voluntary" and "compulsory" are used to distinguish between petitions presented by the debtor himself and those at the instance of creditors. If a creditors' trustee supersedes the official assignee, the latter is to receive, as remuneration for his temporary services, the sum of £5 if the gross assets do not exceed £200, and £10 where they exceed that sum. If the official assignee continues in office, he is to receive such remuneration as the creditors decide; or failing such decision, as the Court may award, not exceeding 5 per cent. on the gross assets. The creditors' trustee accepts office on the same terms. This of course does not include Court dues or solicitors' charges, and, if we are to judge by the very full schedule of fees and costs appended to the Act, these are quite equal to similar dues and charges in England. In Victoria there is a separate Court of Insolvency and a separate judge; but all judges of County Courts are also judges of the Court of Insolvency, and may preside at a Court in their own district. In 1897 Victoria found itself behind the age in adhering to a repealed English Act, and accordingly, by an amending Act of that year (61 Vict., No. 1513), numerous provisions were taken from the English Acts of 1883 and 1890. More extensive duties by way of inquisition and examination were imposed on the officials, and the creditors are now called upon, as in England, to attend, at their own charges, to the moral health of the mercantile community.

New South Wales.—In New South Wales, which is the only other colony to which I need refer, the course of bankruptcy legislation has been similar to that of Victoria. The principal Act was passed in 1887, at which date the Legislature had the benefit of the existing English Act.

In 1898, however, the Act of 1887 was revised by the commissioner for the consolidation of the Statute Law, and was repealed and re-enacted with a few alterations, chiefly verbal. The existing Statute is therefore the "Bankruptcy Act, 1898" (62 Vict., No. 25). Its general scope is more in accordance with the English Act of 1869 than with Mr. Chamberlain's Act, but it obviates the most serious defect of its model by providing for the protection of minorities. If creditors appoint a trustee, they fix his remuneration, which must be of the nature of a commission or percentage. If one-fourth in number or value of the creditors dissent, or if the bankrupt satisfies the Court that the remuneration is unnecessarily large, the Court fixes the remuneration (s. 82). If no remuneration has been voted, the trustee is allowed such proper costs and expenses as the registrar may allow (s. 83). Where the creditors have not appointed a trustee, the official assignee is remunerated at the rate of 5 per cent., of which one-half is calculated on the gross amount of the estate, and the other half on the dividends when declared. The creditors may, however, resolve to allow a larger amount, subject to the special power of appeal already referred to. The charges of solicitors and others are to be taxed by the registrar or taxing-master, and, as in Victoria, there is appended to the Act a scale of Court fees.

The United States: the New Act.—The United States of America, as already stated, has now a national law of bankruptcy; but as it only took effect on July 1, 1898, it is too soon to judge of its merits from the standpoint of experience. Bankruptcy legislation in America has had a singular history. By the constitution, Congress had the power specially reserved to it of framing national laws on the subject. This power was first exercised in 1800, but though the Act was to remain in force for five years it was repealed by an almost unanimous vote in 1803. After the commercial panic in 1837 another national law was passed, but it was repealed in less than thirteen months. The financial disasters attending the Civil War led to another enactment in 1867, which withstood opposition till 1878. There has therefore not been more than fifteen or sixteen years of a national law during the whole century. The present Act has been more deliberately and carefully framed than any of its predecessors. In some form or other it has been before Congress for many years, and it gives some indication of the widespread feeling among the mercantile community of the necessity for such a measure to supersede the diverse and irreconcilable State laws, that in the year preceding the Act no less than eleven separate Bills on the subject were laid before Congress. The Act, practically as it now stands, was passed by the Senate so far back as 1884, and at length, on February 19th, 1898, it passed the House of Representatives by 159 to 125 votes.

The Scheme of the Act Sketched.—It is impossible to give more than a few of its leading features. The distinction between voluntary and

involuntary bankruptcy is very marked. Any person (not a corporation) may file a voluntary petition in insolvency so as to obtain for himself the benefits of the Act, but involuntary proceedings can only be taken against corporations or against debtors owing $1,000 or over, except wage-earners or persons engaged in farming or tilling the soil (s. 4). Wage-earners are defined as individuals who work "for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year" (s. 1). Three creditors, having in the aggregate claims amounting to $500, or if the whole creditors are less than twelve, then one creditor having a claim of that amount, may file a petition (s. 59). The Act defines as "Acts of Bankruptcy" any fraudulent conveyance or preference, the granting of an assignment for creditors, and a written admission of inability to pay debts and of willingness to be adjudged a bankrupt (s. 3). An involuntary petition must be preceded by an act of bankruptcy, and must be filed within four months of such act. It is a complete defence to prove that, at the date of filing the petition, the person was not insolvent. Insolvency is defined in the absolute, not in the practical sense—that is to say, a person is insolvent where the aggregate of his property, at a fair valuation, is insufficient to pay his debts (s. 1), but he is not necessarily insolvent merely because his realised assets are insufficient to meet his liabilities.

The administration of the Law of Bankruptcy is entrusted to the ordinary district Courts of the United States and Territories, which for this purpose are called Courts of Bankruptcy (s. 1). Each Court is bound to appoint officers called referees, in such numbers as may be necessary to assist in expeditiously transacting bankruptcy business within the jurisdiction. Each referee is appointed for two years, but he may be removed if the Court think his services are not needed, or for any other cause. These referees consider petitions referred to them by the clerks of Court, administer oaths, and examine witnesses. In the absence of the judge, or in the event of his sickness, the referees exercise the power of taking possession of, and releasing, the bankrupt's property. They may also perform such other judicial duties as may be devolved on them by rules or orders of Court, except where the question relates to an application by the bankrupt for a composition or a discharge (s. 38). Referees also declare dividends, and prepare and deliver to the trustee dividend-sheets showing the dividends declared and to whom payable. They have also a large number of other specified duties connected with the administration (s. 39).

The creditors at their first meeting, by a majority vote in number and value, appoint either one or three trustees. If they fail to do so, the Court makes the appointment (s. 44). When three trustees are appointed, the concurrence of at least two of them is necessary for every act. The trustee collects and reduces to money the property of the estate, disburses money by cheque or draft, makes up detailed statements of the administration, and pays dividends within ten days after these are declared by the referee. He

also, within the first month after his appointment and every two months thereafter, reports to the Court in writing the condition of the estate, and the amount of money on hand. Dividends are to be paid as often as the money in the trustee's hands enables him to pay 10 per cent. of the allowed claims (s. 65).

After his judicial examination, the bankrupt may offer a composition to his creditors which may be accepted by a majority in number and value. To be effectual it must be confirmed by the Court after hearing objections. Confirmation only takes place where the judge is satisfied that it is for the best interests of the creditors, and that the bankrupt has not been guilty of any breach of duty or of good faith (s. 12). The effect of a composition is that the legal title to the assets remains, or is re-invested, in the bankrupt. The composition also operates as a discharge (s. 14).

Where there is no composition, the bankrupt may, after the expiration of one month, and within twelve months from the date of the bankruptcy (*i.e.* from the date of the filing of the petition), present an application for discharge. Parties are allowed a reasonable opportunity for being heard, after which the judge grants the discharge unless the bankrupt is shown to have committed a punishable offence.

Fees.—It is alleged that the excessive fees allowed under the national law of 1867 was one of the causes of its repeal, but American lawyers testify that the fees under the present Act are extremely moderate. The petitioner deposits $25 with the clerk of Court, of which $10 are paid to the clerk himself, $10 are kept by the clerk for the referee, and $5 kept for the trustee, in each case to be paid to them respectively for services after they are rendered (ss. 40, 48, 51). In addition, the referee receives 1 per cent. commission on sums paid as dividends, and 1½ per cent in the case of a composition. The trustee receives, in addition to the $5, such commission on dividends as may be allowed by the Court, not exceeding 3 per cent. on the first $5,000 or less; 2 per cent. on the second $5,000 or part thereof; and 1 per cent. on sums in excess of $10,000. Where a voluntary bankrupt makes affidavit that he "is without, and cannot obtain the money with which to pay," the initial fees, the bankruptcy may proceed without the deposit (s. 51). The duties of marshal, which resemble those of our sheriff's officer, are remunerated by the usual fees paid for their services. There is also allowed a reasonable fee for one attorney in respect of professional services actually rendered to the petitioner, whether voluntary or involuntary, in connection with the duties specially imposed upon them by the Act (s. 64). Necessary outlays in connection with the preservation of the estate subsequent to filing the petition also form a first charge upon the assets (s. 64).

The American Act seems to have met with general acceptance as a much-required reform. The interminable questions arising out of the effect in one State of a discharge granted in another State are set at rest. It has, however, been objected that the interests of the debtor are protected more

carefully than those of the creditors. "A discharge is granted without regard to the dividends or the lack of them, and without the assent of any part of the creditors. The acts of bankruptcy affording ground for a creditor's petition do not include non-payment of debts, and an insolvent debtor who can refrain from making fraudulent conveyances or giving or allowing preferences may avoid bankruptcy indefinitely."[1]

Continental Systems.—With the exception of Scotland, the root-stem of the systems of bankruptcy we have hitherto examined has been that of England, but the continent of Europe presents an entirely different type. The old Common Law of insolvency in France was analogous to that of Scotland; but bankruptcy, as a code or system of procedure, went on entirely different lines. The French Code of 1807 was adopted by almost every other country on the continent of Europe, and in many cases it is still in force with more or less of adaptation to modern circumstances. In France itself the Bankruptcy Code of 1807 was superseded by that of 1838, but the latter does not differ materially, either in principle or in practice, from the older Code. Germany, upon its consolidation into an empire, broke loose to a large extent from the Code Napoléon, and has now a distinct bankruptcy law of its own. A glance, therefore, at the French and German systems must serve to exhaust our present review.

France.—In regard to France, I have to acknowledge my indebtedness to M. Léopold Goirand, a distinguished *avoué* of Paris and the author of a valuable treatise on French Commercial Law. He has not only answered my specific enquiries, but has supplied me with much valuable information on the lines of my special study. As we have seen, the distinction is still retained between trader and non-trader.

(i) *Non-Traders.*—If a person be a non-trader he can only put himself *en déconfiture*, which, since the abolition of imprisonment for debt, means little more than a state of discomfort. This is removed only by a return to solvency, but on the other hand it brings with it no civil disabilities. So long as imprisonment for debt lasted, there was always the debtor's remedy of Cessio Bonorum (*cessions de biens*), but M. Goirand informs me that during twenty-eight years of practice he has never heard of a single case. The process of *cessions de biens* forms the subject of Articles 1265 to 1270 of the French Code of Civil Procedure, but it was a debtor's remedy, and could only be instituted by the debtor himself. As in Scotland, the motive no longer exists, and, differing from Scotland, no other motive has been substituted. Professor Laurent doubts if, since the abolition of imprisonment for debt in 1867, judicial cessio, as distinguished from voluntary cessio, any longer exists.[2] The Civil Code provided no procedure for distribution of the assets; but we learn from text-writers that, in practice, the creditors formed themselves into a union, and appointed an administrator of the goods

[1] Harvard *Law Review*, xii., p. 272.

[2] *Principes de Droit Civil Français*, vol. xviii., p. 256.

ceded to them.[1] M. Goirand informs me that under the Code of Civil Procedure[2] the assets of a civil debtor (non-trader) may be distributed among the creditors; but such distribution does not concern the general assets, but only the particular effects seized. These are distributed *pari passu* amongst all the known creditors, those doing diligence not being permitted to retain more than their share. The process seems to resemble the Scottish equalisation of diligences against a notour bankrupt, under s. 12 of the Bankruptcy Act, 1856.

(ii) *Traders.*—Bankruptcy, as applied to traders in France, is a much more rigorous proceeding. It is divided into three classes: (1) *Faillite*—an insolvency attended with no fraudulent circumstances; (2) *Banqueroute simple*—in which transactions punishable by law are discovered; (3) *Banqueroute frauduleuse*, or criminal bankruptcy. The first involves no punishment, but it subjects the insolvent to many disabilities. He has no political rights, he cannot hold any public office, or sit on a jury, or act as a stockbroker or any broker. He cannot appear on the Bourse, or open an account with the Bank of France. A discharge in bankruptcy, even where accompanied by a *déclaration d'excusabilité*, leaves the balance due to the creditors a debt of honour, the non-payment of which prevents *réhabilitation*, and leaves the debtor under the moral stigma of the disabilities already mentioned. The two forms of *banqueroute* are both punishable. *Banqueroute simple*, which exists where the bankrupt has been guilty of offences such as gambling or speculation, or even extravagant living, is punishable by imprisonment for from one month to two years; and *banqueroute frauduleuse*, as a crime, is punishable by penal servitude for from five to twenty years.

Every trader who suspends payment must file a declaration thereof at the office of the Tribunal of Commerce of his district. He must render an account of his conduct and of the state of his affairs, and if he fail to do so, he may be declared *banqueroute simple*. On this declaration the debtor may be adjudicated bankrupt. Any creditor, no matter what the amount of his claim, or whether it is secured or privileged, may also institute the proceedings by summoning the debtor before the Tribunal and proving the suspension of payment. The Tribunal fixes the date of the bankruptcy, which has no reference to the commencement of the proceedings, but relates back to the day on which the condition of insolvency actually commenced. The effect of the adjudication is to deprive the bankrupt of the right to administer his property from the day on which the bankruptcy is declared to commence. The ownership is not passed, but the right of administration passes from the bankrupt to the syndic. *Acquirenda* also pass to the syndic; but if the bankrupt has contracted new debt in the course of business, the new creditors have a preference over the new assets. The following acts and things are void if done after the date declared for the commencement of the bankruptcy, or within ten days previously thereto: (1) a gratuitous

[1] Laurent, *ut sup.*, p. 244. [2] Art. 656, *et seq.*

gift by the bankrupt; (2) a private or latent contract between the bankrupt and any other person; (3) a judicial mortgage, which the French law allows to any creditor who holds a judgment against his debtor; and (4) any payment made by the bankrupt in advance of the due date. To be void, however, a mortgage must be for an antecedent debt, and not a *novum debitum*.

The administration is under the general charge of the Tribunal of Commerce, which, in adjudicating the bankruptcy, appoints one or more provisional syndics. At their first meeting the creditors are consulted as to the appointment of new syndics, after which the Court, without being bound by the views of the creditors, either appoints new syndics or retains those already appointed. In most cases only one syndic is appointed, but the law always speaks of syndics in the plural. The Court also appoints a member of its own body to be *juge-commissaire*, whose duty is to watch over the management, and, where possible, to accelerate the proceedings. He makes orders, which, however, may be appealed against to the Tribunal, and he is bound to report to the Tribunal as to all disputes.

Creditors must lodge their claims, with vouchers, within twenty days after advertisement to that effect; but if they reside beyond the town in which the Tribunal of Commerce declaring the bankruptcy is situated, they are allowed an additional day for every five *myriamètres* of distance (fully thirty-one miles). Where there is no offence or crime, a composition (*concordat*) may be granted upon the vote of the majority of the creditors and confirmation by the Tribunal. Under a composition, the bankrupt is re-invested, and if he pays the amount he is freed from penalties; but even then the greater part of the disabilities already mentioned remain, and can only be removed by *réhabilitation*, which involves payment of all his debts in full. In the absence of composition, the bankruptcy proceeds to its natural close, and the insolvent who is not *banqueroute* may obtain a discharge accompanied by a *déclaration d'excusabilité*, although, as we have seen, this declaration has at best only a moral effect.

Judicial Liquidation.—Since 1889 there has also been in France a law of judicial liquidation by which a trader who has stopped payment may avoid the rigorous consequences of bankruptcy, and especially the incapacities and loss of rights which bankruptcy involves. The right is entirely personal to the trader himself. He presents a petition with balance-sheet to the Tribunal of Commerce, together with a list of his creditors. The Court hears the applicant in person, and if satisfied that his claim is well founded it grants his petition and appoints a *juge-commissaire* and provisional trustee. A meeting of creditors is then called by the *juge-commissaire*, who asks their opinion as to the appointment of a permanent liquidator, and of a committee from among themselves. Upon the report of the *juge-commissaire* the Court may appoint as requested. Judicial liquidation is terminated either by a discharge of the debtor on composition, or by a winding-up as in bankruptcy,

or by an actual bankruptcy. A majority in number, and two-thirds in value, of the creditors is required for a discharge.

Cost of Proceedings in France.—As to the cost of bankruptcies and liquidations in France, I have received some valuable information from M. Goirand, which I transcribe as nearly as possible in his own words: "The syndic or trustee of a bankruptcy or of a liquidation delivers his account for the approbation of the Court. The disbursements for legal procedure paid to the *avoués* and to the Bar vary according to the litigation encountered. With regard to the personal fees of the trustee, they depend upon the amount of the realised assets, and upon the dividends distributed, but there is no scale. The Court decides what his remuneration is to be. With regard to this, the Court considers (1) the length of time that the winding-up has lasted, (2) the difficulties that have been met with, and (3) the sums recovered by process against debtors. For instance, in a bankruptcy where 50,000 fr. of assets have been distributed without much litigation or complications, the trustee might be allowed a fee of 2,000 fr. (4 per cent.). If the sum distributed were ten times as much, say 500,000 fr., his honorarium might be fixed at 8,000 fr. (1½ per cent.). In unimportant provincial Courts the proportion of fees is higher than in Paris, because the trustees rarely get important cases, and their remuneration is derived from smaller matters. But the whole question depends upon the appreciation of the Courts. The solicitor who has obtained the adjudication is paid by the creditor who instructed him. His duties cease when adjudication or judicial liquidation is granted. From this moment the trustee acts alone for everything which is not litigation, and where there is such he chooses his own solicitor. In Paris, when there are no assets to pay even expenses, the trustee receives a fixed fee of 50 fr., whatever trouble he takes. The creditors provide the whole of the expenses of a bankruptcy out of the assets; but where there are no assets the State provides 50 fr. in each case for the trustee, who is bound himself to wind-up the estate and to bear any loss incurred thereby beyond such 50 fr. The law is silent as to the kind of person to be chosen as trustee. In the provinces the solicitor who has obtained the adjudication is appointed trustee. In Paris the syndics constitute a corporation, each member of which is appointed by the Court. They each lodge in Court caution-money to the amount of 100,000 fr., and they are jointly and severally liable as a body in case of malversation by one of them. Their number is limited to twenty. They fulfil the duties of liquidator or trustee according to whether it is a case of judicial liquidation or bankruptcy."

The German Code of Bankruptcy.—A few words about bankruptcy in Germany must conclude my review of the various bankruptcy systems.

The German Code of Bankruptcy, to which I have already referred, was passed on February 10, 1877. Before that date the bankruptcy law differed in the several States of the Empire, and was "wholly chaotic." Prussia had, in 1855, passed a bankruptcy law of its own, which served as a model for

the new Code. In Germany, as in France, a distinction is made between failure and bankruptcy, and, as in France, the latter has two forms, punishable with different degrees of severity. Simple bankruptcy is established by extravagance, gambling, dealing in futures, or disorderly book-keeping, and is punishable by imprisonment up to two years. Fraudulent bankruptcy is established by the hiding of property, by fictional debts, by falsifying books, and by the granting of illegal preferences. It is punished by confinement in the penitentiary up to ten years. Either debtor or creditor may present a petition to the *Amtsgericht* or ordinary provincial Court, and where the estate is found insolvent the *Amtsrichter* appoints, if possible from among the creditors, a trustee whose duty it is to wind up the affairs without unreasonable delay. The creditors are called together within one month from the date of the bankruptcy order, and at their meeting they may appoint a committee of their number to advise with the trustee. They may also nominate a new trustee to take the place of the one appointed by the Court, but the Court is not bound to give effect to their nomination. It is the duty of the Court to see that the trustee fulfils his functions, and that his acts are legal. The estates are liquidated with great rapidity. In order that creditors may receive dividends at the earliest moment, it is customary to sell the assets of the insolvent debtor by auction, but all lawful claims remain valid against the debtor until the close of the bankruptcy. The creditors, by a majority in number and three-fourths in value, may accept a composition, but it must have the approval of the Court. The composition re-invests the debtor, but renders him again liable to the ordinary forms of diligence. There are no special provisions in the Code as to costs, but they are said to be very moderate. The trustee is paid out of the Court dues, which do not exceed 2 per cent. of the realised assets. In an ordinary bankruptcy the attorney's fees do not exceed £5. If there are no assets, or if the assets seem to the Court insufficient to pay the expenses, the bankruptcy is not allowed to proceed.

Conclusions from Survey of Systems.—The chief aim of this rapid survey has been to afford material from which each may draw his own conclusion; but I may be permitted a few words by way of comparison. The three leading objects previously described as giving rise to bankruptcy legislation may, for the sake of brevity, be respectively designated punishment, rehabilitation, and distribution. Punishment and rehabilitation are practically opposites, the former representing a rigorous application of the criminal law of bankruptcy, as in France and Germany; the latter embodying extreme consideration for the person of the debtor, as in the United States. In France and Germany, and generally on the continent of Europe, gambling and even extravagant living are criminal offences punishable with imprisonment; in the United States, on the contrary, no one can be made bankrupt against his will, and mere non-payment of debt does not form an act of bankruptcy entitling the creditors to take the estate into their own hands.

The leading object of the American system is the release of the debtor from the burden of obligation which degrades the individual and deprives him of his full status as a citizen. In modern English bankruptcy, punishment predominates, although it is only fair to add that the system of distribution, though costly, is very complete. In Scotland, distribution has clearly the first place. Punishment has no place at all, except where necessary to obtain full disclosure of the assets; while rehabilitation is a minor detail, and only exists in so far as it is entirely consistent with the interests of the creditors, who are the true owners of the property to be distributed.

The Judicial and Administrative Sides.—Bankruptcy legislation differs not merely in its objects, but also in its methods. Every system has necessarily two sides, the judicial and the administrative. In England, France, and Germany the administrative is to a large extent bound up with the judicial. The administrator, like the judge, is an official, and is appointed by the Court either with or without consultation with the creditors. I have included England in this category, for it cannot be said that the option given to creditors to appoint their own assignee to supersede an official assignee already in possession of the estate, is a concession of any real value. On the other hand, in Scotland and the United States the creditors have, through their trustee, the sole control of the administrative functions, subject only to such supervision as is necessary to secure faithful dealing and a due regard to conflicting rights. As to the creditors' trustee, the general rule is that there is no restriction in the choice, provided the person chosen has no interest prejudicial to the equitable adjustment of rights, and that he finds such security as the Court orders or the creditors fix. But in Victoria, under the Act of 1897, a system has been introduced for the registration of trustees. Any person may make application, and if registered, he must find general security for his actings in any estate to which he may be appointed. If the creditors appoint an unregistered person, he must get himself registered and find security before he can act. In Scotland, Germany, and the United States the judicial functions are entrusted to the ordinary local Courts; and recent legislation in Ireland is a recognition of the advantages of this system. France is practically in the same position, each district having a Tribunal of Commerce dealing with commercial matters, including bankruptcy. In England, also, there has of late been a marked advance in the same direction, the ordinary County Courts now taking the place of the cumbrous District Courts of Bankruptcy. In England the necessary supervision of the administrative functions is undertaken by the officials of the Board of Trade; in Scotland by the Accountant of Court; in France by the *juge-commissaire*; and in the United States by the referee.

Incidence of Costs.—The question remains as to the costs, and by whom they are paid. We have already considered the equities, but a few words may be added as to the facts. The expenses of the judicial functions, although,

as we have seen, they do not form a fair charge, are borne in England and Ireland by the creditors in the form of High Court dues and fees. In order to make the bankruptcy system self-supporting, the creditors, unlike other suitors, pay for the entire judicial establishment, including pensions and other legacies left from the still more expensive bankruptcy systems of the past. In Scotland, and so far as we can judge, in Germany, France, and the United States, the fees are no higher, perhaps even less, than those paid by ordinary suitors. In France and in America the State, as we have seen, directly contributes a small sum in cases where, from want of funds, the process of winding-up is likely to be prevented or impeded.

In conclusion, I may express the hope that I have given you some materials for reflection. At the same time I am painfully conscious of the imperfections, and possibly the inaccuracies, involved in this attempt to set forth particular sections of systems of jurisprudence with which I cannot claim any practical acquaintance.

MODERN DEVELOPMENTS OF MOHAMMEDAN LAW.

[*Contributed by* Sir Raymond West, K.C.I.E.]

The Conditions of Progress.—The author of this small work, entitled *De l'Action Pénal en Droit Musulman, par Omar Bey Loutfy*, who is a professor of the Law School at Cairo, belongs apparently to the class of modern Mutázilas, or Freethinkers, to whom we must look for such reforms of the Mohammedan Law as in its nature it will admit. That it does admit of great reforms—that is, of such developments and adaptations as will fit it to modern necessities—is the firm opinion of many enlightened Musulmans. It is the hope of many who, without being Musulmans, are friends of the Musulman community, and who, guided by the light of history, look for vital and lasting improvements in Mohammedan polity and law rather to an outgrowth from existing roots in the system than to the forcible introduction of wholly foreign matter from without. The Mutázilas of the first and second centuries from the *hijra* succumbed to the Puritan reaction provoked by their audacious handling of the fundamentals of the Moslem faith; those of the present day are keen controversialists in favour of their creed, but, taking its essentials as a basis, they strive to deduce from these a system as rational and flexible as those of the Christian nations. The explicit teachings of the Korán lend themselves without much strain to this design. The passages that oppose progress can for the most part be got round by comments which assign to them only a special local or occasional application, and the general ethical spirit of the sacred volume is perfectly sound. The traditions present more difficulty. They were gathered in a rude age, by uncritical people, from sources of very various degrees of trustworthiness. They present many inconsistencies, and are to a large extent certainly unauthentic. The first condition of Moslem jural or jurisprudential progress within the limits of orthodoxy is the application to these traditions, and the vast fabric of doctrine built on them, of a wise and free criticism. The way will thus be cleared for bringing most of the gains of European experience and thought within the reach of conscientious Mohammedans. Such a process, though tedious, is almost indispensable. The doctrines which govern men's relations and dealings throughout the

civilised world can almost without exception be "Islámised" by learned and judicious reference to the Korán. When such a basis has been found and established by a recognised authority, the structure erected on it is accepted by the pious Moslem as impregnable and unquestionable; without it he must needs look on secular legislation as a mere group of temporal and temporary expedients having almost no moral claim to his obedience.

"**Islamising.**"—This task of "Islámising" the elements of rational progress must be carried out by the Mohammedans themselves; they only are imbued with the requisite spirit, and can command the requisite confidence. That it is not an impossible one is proved by the examples of their great jurists of the eighth century. The new age calls for a new philosophy of the law; but the materials for this lie ready for the hand that can mould and animate them. A modern Imámdi Azim is called for, one equally sound in principle as his great precursor, but applying a deeper and wider-reaching *qiyás* (or dialectic) to the more complex problems presented by the kaleidoscopic life of to-day. A useful preparation is in the meantime carried on by those writers who, like the learned Bey, become apologists for some part of the Mohammedan system by tracing its analogies to present or past institutions of the Christian nations, or by showing that its penalties are less cruel in practice than they seem. The origin of stoning as a punishment for adultery, and of mutilation for theft, in præ-Islámic customs of the Arabs, cannot be readily accepted as a good reason for the retention of such punishments by a prophet who is believed to have been divinely guided. Nor is it a merit of the system to be set off against these barbarities that they are seldom inflicted on account of the difficulty of satisfying the designedly hard conditions of a conviction. Such conditions are in truth only an additional blot on the system. What is wanted is facility of proof in cases of real guilt,—the absence at least of artificial difficulties,—coupled with penalties duly proportioned to the offence and free from the atrocity which generates callousness to human suffering.

There was a time when a not very dissimilar state of things existed in this country and in Europe generally. The method of enquiry into the guilt of one accused was a balancing of irrelevancies, with a leaning towards a conviction; and coupled with this was a scheme of exonerations that relieved offenders with little regard to their relative demerits. It is no small part of our civilisation that we have outgrown such a system, have found our way to a rational method of investigation and to a scale of punishments which tempers repressive severity with respect for humanity.

Enlightened Mohammedans are conscious that they will have to do likewise; their apologies imply a reference to a higher standard than that of retaliation and of corporal injury as appropriate sanctions for the Criminal Law. But they will have to face the necessities of the case more squarely and boldly before they can make it a point of belief amongst their co-religionists that

such punishments are as opposed to the spirit of the Korán as they now seem agreeable to its letter. There is a tradition in favour of moulding the law to the needs of times and places on which reformers may always take their stand as advocates of progress through free interpretation.

Crime and the State.—To the English lawyer it is interesting to note that the Mohammedan Criminal Procedure prefers in the trial of a case the method of open accusation and debate to the inquisitorial system borrowed on the Continent from the Canon Law. The denunciation of a crime is not the function of an official class, but the right of the person injured. It is his exclusive right, the interest of the State in the matter not having as yet been so generally recognised as to admit any member of the community to be an accuser. This treatment of the subject sprang of course from the earlier system of personal and tribal vengeance for wrong. Mohammed succeeded at once in what was so slowly won by the royal jurisdictions in Europe: he induced his followers to seek retribution at the hands of the sovereign instead of starting a blood-feud. But still the prosecution only took the place of personal vengeance; it was a right that the victim or his heirs could exercise or forego, and the pardon—usually a purchased pardon—by the family of a murdered man long sufficed, even in British India, to withdraw an assassin from the hands of justice. Under a purely Mohammedan *régime* this must still be the law. Omar Bey says the public interest may be guarded by bringing any such case within the category of "tazirs"—*i.e.* offences punished by discretionary penalties independently of the will of the person injured. This has not generally been so understood. The "had," or fixed punishment, prescribed for some crimes is distinguished from the "tazirs," or discretional punishment, for others; but the "kisás," or right of retaliation, belongs to the complainant to give up equally as to enforce. To punish a murderer after he had satisfied the heirs would in the next similar instance go to deprive the heirs of the blood-money they might otherwise obtain. The "kisás," or the "had," it is admitted, cannot be exacted or inflicted save at the instance of the person injured; but according to Omar Bey a "tazir," undefined by the sacred law, but limited by the sovereign's regulation, may supersede both "kisás" and "had." This appears to require some further proof. The "appeal" of the heir under the English Law long subsisted concurrently with the repressive right of the Crown. It will be a curious similarity if by the aid of the doctrine of "Al siassah al sharia," or "jural policy," the law of "tazir" should be found capable of such expansion as to overlap, and eventually swallow up, the whole system of "kisás" and "diah" (= money compensation).

"**Offences against God.**"—The strictly personal right of pursuit in cases of personal injury is emphasised, as it is bounded, in the Mohammedan Law by the existence of a class of "offences against God"—*i.e.* generally against the State or public at large, as distinguished from the individual.

In such cases any member of the community may prosecute, but no one may remit the prescribed penalty. Where the personal interest predominates, as in offences of violence or fraud, the general right is merged in that of the individual sufferer. Omar Bey makes the "tazirs" work side by side with these two classes of prosecutions in cases wherein, as he says, "the legal penalty is for some reason not inflicted." But if it is really a legal penalty, it must be inflicted in a case of proved guilt, except where prosecution and demand of judgment constitute a private right, and in that case the discretional sentence of the judge is wholly dependent on the claim of the complainant. Such at least is the general doctrine, and it is evidently desirable that Mr. Loutfy should fortify his more advanced position —as no doubt he can—by some arguments drawn from sacred or recognised authorities.

"Infidel" Evidence.—The classification of offences as against an individual or against God—*i.e.* against society—leads to an important distinction in the Law of Evidence. A witness must be *integer vitæ* according to the Mohammedan Law. But in a private prosecution he, being a Musulman, is presumed trustworthy, unless his integrity is challenged; while in a case not involving direct personal injury, the judge is bound to satisfy himself of the witness's integrity before receiving his testimony. This practically deprives of any value the evidence given by infidels. This subject is not dealt with by the learned Bey. It is of importance in a mixed community, since the non-reception of Christian testimony against a Moslem confers on the latter a virtual license for crime.

Number of Witnesses.—Another subject calling for more complete treatment than has been assigned to it is that of the specific number of witnesses required to establish a case of "had"—*i.e.* one subjecting to a strictly defined punishment. Thus adultery can be proved only by the evidence of four males or of three males and of two females. As failure to establish a charge subjects the accuser to eighty strokes of the bastinado, it is not surprising, perhaps, that prosecutions are very rare. The slightest discrepancy in the evidence is a ground for acquittal and its painful consequences to the complainant, and there may thus be one of the dramatic turnings of the tables in which Oriental story-tellers delight. As Omar Bey observes, it is easy to understand why strict proof is insisted on in such cases, but that is no reason why an artificial, arbitrary rule should supersede the exercise of the judge's reason and conscience. We preserve a trace of a similar system in requiring two witnesses to prove an act of treason; and the system of "legal proofs" on the Continent has not quite disappeared even from Criminal Procedure. But in Bengal one of the earliest modifications of the Mohammedan Law forced on the British governors was the abolition of the rules which Omar Bey approves. The defects of the substantive Penal Law are not to be remedied by another set of defects in the Law of Procedure, but by revision of the substantive law itself.

Confessions.—Confessions play a large part in the Mohammedan procedure, and in cases of doubt a great deal is made to depend on the oath of the defendant. The judge is not bound to attach weight to a prisoner's admission, unless satisfied of its sincerity. Experience has taught Indian judges that amongst Orientals this is a salutary rule. There is another one closely connected with it which has undesignedly been imitated in the Indian Criminal Procedure. The confession which, through infirmative circumstances, will not support a conviction, may yet ground an order for the restitution of the property in question to the apparent owner. But we should think it going much too far to convict an accused on his confession *quâ* the "diah," or blood-fine, and at the same time acquit him *quâ* the "had," or capital punishment annexed to murder. The interest of the relative and complainant in such a case must needs be wholly subordinated to that of the State.

The Right Path of Reform.—We have touched on but a few of the interesting points which Omar Bey's essay presents for a comparison between the Musulman and the Christian systems of Criminal Procedure. His little volume will repay an attentive perusal. It tells us much, both directly and indirectly, as to the present mental attitude of enlightened Mohammedans towards jural expansion and progress. There was a time, extending over centuries, when the Moslem jurisprudence was distinctly in advance of that of Western Europe. It became stationary and obstructive through its sacro-sanctity and its entanglement in a network of inept and unauthenticated traditions. The way to reform is evident, and in a Mohammedan sense the indispensable changes should far rather take the shape of revision and a growth from within than the introduction of incongruous laws from without.

THE SOURCES OF THE LAWS OF THE COLONIES.

[*Contributed by* W. Harrison Moore, Esq., *Professor of Law in the University of Melbourne.*]

Multiplicity of Sources.—The returns which have been made by the Colonies to the circular of the Society, and published from time to time in this *Journal*, as to the sources of the law in operation in the respective Colonies, display one feature which is bound to strike an English lawyer as remarkable. Accustomed to a legal system whose feature is its unity in source and in authority, he is struck by the multiplicity of sources in the Colonial system; and in place of singleness of authority he finds not a little doubt and conflict. The Common Law, the Prerogative, Acts of Parliament and Orders thereunder, play their part as in England. But the Prerogative looms larger in Colonial than in Home institutions; Acts of Parliament have varying force and authority according to their date and their nature; Orders in Council are less frequently Acts of supplementary legislation than the exercise of a statutory suspending power or power to put into operation. In addition to these are the Acts and Ordinances of Colonial Legislatures, sometimes Legislatures between which the power of legislation is divided, sometimes of Legislatures which have been superseded by others.

This paper was written as an introduction to a study of the Australian Commonwealth Constitution Bill, but it is of general application to settlement colonies, and, indeed, save in a few matters, to colonies of all kinds.

All the Australian Colonies belong to the class of colonies acquired by settlement or occupancy. The doubts once held as to the status of New South Wales as a penal settlement (see Bentham, *Works*, vol. iv.) must now be regarded as set at rest by the decision of the Privy Council in *Cooper* v. *Stewart*.[1] The sources of the law common to all these Colonies are the following:

The Australian Colonies: Common Sources of the Law: (1) Laws of England.—The laws of England at the time of the settlement (or some date fixed by Statute in lieu thereof), so far as they are applicable to the condition of an infant colony. "It hath been held that if an uninhabited

[1] [1889] 14 App. Cas. 286.

country be discovered and planted by English subjects, all the English laws then in being which are the birthright of every English subject are immediately in force" (Salkeld 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony.[1]

The "Laws of England" includes the Statute Law as well as the Common Law. The law so imported is what is sometimes called the Common Law of the colony. The applicability of any law according to the principle laid down is mainly one for judicial determination; but this class of laws falls completely within the power of the Colonial Legislature, which may declare what laws are in force, and may repeal any of them.

(2) **Acts of Parliament made Applicable.**—Acts of Parliament *made applicable* to the colony, either in common with other dominions of the Crown or specially, whether by express words or necessary intendment. These Acts are of paramount obligation.

The expression *made applicable to the colony* requires some explanation. In the first place it excludes those Acts of Parliament which, being part of the General Law of England applicable to the circumstances of the colony, are received at its settlement as part of its Common Law; and it includes all Acts by which Parliament intends to bind the colony, whether those Acts were passed before or after the settlement of the colony.[2] In the second place, an Act of the Imperial Parliament may relate to a colony without being in force there, just as it may relate to a foreign country. An Imperial Act may relate or refer to persons, to things situated, to acts done, or to events happening in a colony or a foreign country; but the enforcement of the regulation established by the Act may belong to the English Courts alone, and be limited by the powers of these Courts to make their orders effective. The Colonies, through their inhabitants and in other ways, receive by many Statutes certain favourable treatment in England and in English Courts, either absolutely or upon terms of reciprocity—*e.g.* by the Colonial Attorneys Relief Acts, 1857, and the Amendment Act, 1884, the Colonial Probates Act, 1892, and the Finance Act, 1894. These and the like Acts are very commonly regarded as "in operation in the colony"; they are, in fact, "in operation in England in respect to the colony." The importance of this distinction is obvious; but it was ignored by those who compared the financial proposals of the Chancellor of the Exchequer in 1894 with the Stamp Act of 1765 and the Tea Duty Act of 1770. Again, the Wills Act, 1861, ss. 1, 2, affects wills made in the Colonies and wills of persons domiciled in the Colonies, but only for the purpose of admitting them to probate in England and Ireland, and in Scotland to confirmation. The Bankruptcy Acts and the Companies Acts illustrate by contrast the two

[1] Blackstone, Com. 1 107.

[2] See Lewis, *Government of Dependencies*, p. 201.

different kinds of operation. The Bankruptcy Acts vest in the trustee the debtor's property everywhere in such a way that the trustee's title is enforceable in all parts of the British Dominions; and a discharge in bankruptcy in England is a discharge in a paramount jurisdiction, recognised and enforced in all parts of the British Dominions.[1] On the other hand, in the winding-up of a company in England, while the English Court will treat its orders as affecting all Colonial property of the debtor, and as binding all his Colonial creditors, the operation of these orders is limited by the power of the English Court to give effect to them; and any recognition they may obtain in the Colonies is due, not to any paramount jurisdiction, but to the "comity of nations,"[2] or whatever principle underlies the "Conflict of Laws."

The general rule, that Acts made applicable to a colony cannot be repealed or varied save by the Imperial Parliament, is occasionally excluded by a provision giving special power to the Colonial Legislature to enact as if the Act had not been passed, and to alter or vary it—*e.g.* Coinage Act, 1853; or to repeal the Act or some part of it, as the provisions of the Merchant Shipping Act, 1894, relating to ships registered in the possession (s. 735).

(3) **Crown Orders or Regulations.**—Orders or Regulations made by the Crown in pursuance of Acts of the Imperial Parliament to which they are equal in authority. These orders—

(*a*) Put an Act into operation in a colony, the Act being in terms postponed in the case of such colony until an order is made. This is the commonest case, and many illustrations might be given—*e.g.* Colonial Courts or Admiralty Act, 1890, in the case of four colonies scheduled, and the Extradition Act, 1870.

(*b*) Suspend the Act, or a portion of it, or apply it with modifications in the case of a colony, generally on the ground that the Legislature of the colony has made suitable provision for carrying out the purposes of the Act—*e.g.* the Extradition Act, 1870, s. 18; Coinage Act, 1853; Colonial Copyright Act, 1847; International Copyright Act, 1886, s. 8, sub-s. 3; Patents Designs and Trademarks Act, 1883, s. 104.

(*c*) Supplement the Act—*e.g.* the Charters of Justice of New South Wales, 1823, and Tasmania, 1831.

(*d*) Bring new subjects within the scope of the Act, as where the operation of the Act depends upon treaties—*e.g.* the Extradition Act, 1870, and the International Copyright Act, 1886.

(*e*) Give to a Colonial law the force of law throughout the British Dominions—*e.g.* Colonial Prisoners' Removal Act, 1884, s. 12; the Fugitive Offenders Act, 1881, s. 32; Merchant Shipping Act, 1894, s. 264 (application of Part II. by Colonial Legislatures).

[1] *Ellis* v. *McHenry*, L.R. 6 C.P. 228.

[2] *New Zealand Loan and Mercantile Agency Co., Ltd.*, v. *Morrison*, L.R. 1898 A.C.

The Orders in Council under the Colonial Prisoners' Removal Act, 1869, s. 4, and the Merchant Shipping Act, 1894, ss. 670–5 (Colonial Lighthouses, etc.) are made upon an address of the Colonial Legislature.

(4) **Prerogative Orders, Charters, Letters Patent.**—Prerogative Orders, including Charters and Letters Patent. These are not of the same importance in a settled as in a conquered colony, for as constitutions come to rest more and more on Statute, the Prerogative recedes. Its most important exercise is in the grant of constitutions, the establishment of executive authority, the appointment of Governors and the definition of their powers, and the setting up of Courts of Justice. Most of these things in Australia, however, are done by the Crown under statutory authority, and so fall into the last class. The Orders in Council relating to Colonial Currency are a conspicuous case of Prerogative Orders in operation in the Colonies.

(The Orders in force in 1890 are contained in the collection published "by authority" under the title *Statutory Rules and Orders Revised.* The Prerogative Orders are contained in an appendix in vol. viii. Later Orders are in subsequent volumes published annually.)

(5) **Ordinances of Colonial Legislatures.**—Laws and Ordinances made by the Legislatures of the colony, meaning thereby the authority other than the Imperial Parliament or the Crown in Council competent to make laws for the colony. There may be more than one such authority. Some colonies have been formed by separation from others, and inherit the laws enacted by the Legislatures of the mother colony before the separation. Such laws, so far as they apply within her borders, the daughter colony may repeal. In other cases there may be Legislatures with exclusive powers over different subjects, or with concurrent powers, but so related that, in case of conflict, the enactment of the one shall prevail over the enactment of the other. Both these conditions are true of the Dominion of Canada and of those colonies of Australia constituting the Federal Council of Australasia. In these cases the powers are generally exclusive; but where the same matter is within the power of both the Central and the Local Legislature, the enactment of the Central Legislature prevails. Each authority retains control over its own laws, and may alone alter or repeal them. Amongst "Laws and Ordinances made by the Legislature of the Colony" are included many Acts of the Imperial Parliament which have been adopted for the colony by the Local Legislature. They form part of the ordinary legislation of the colony, and are to be distinguished from other local laws merely by a rule that where a Statute has before its adoption by the colony received an authoritative judicial construction in England, that construction is deemed binding in the Colonies.

The powers of Colonial Legislatures are defined by the Colonial Laws Validity Act, 1865, 28 & 29 Vict., No. 63. They have power generally to make laws for the peace, welfare, or order and good government of the colony. Special powers of legislation have been conferred by the

Imperial Parliament by many Acts on various grounds, of which the following are the principal:

(*a*) The general power to make laws has always been limited by a condition that such laws should not be "repugnant to the laws of England." This condition has received widely different interpretations, and the view which has ultimately prevailed has been embodied in the Colonial Laws Validity Act, providing that—

> (S. 2) Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> (S. 3) No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act, Order, or Regulation as aforesaid.

But under the influence of narrower interpretations, Acts of Parliament had been from time to time passed to enable the Colonial Legislatures to make laws on specific subjects—*e.g.* 6 & 7 Vict., No. 22—empowering Colonial Legislatures to make laws for receiving the evidence of barbarous and uncivilised persons. These Acts, although the occasion for them has gone, are generally still in force.

(*b*) Colonial Legislatures are "local and territorial legislatures,"—an expression used to denote that their power is different in kind from that of the Imperial Parliament. For while the Imperial Parliament, like the organs of every sovereign state, is limited territorially by its power through the Executive and the Courts to give effect to laws, it can constrain every person and every authority within its borders to treat its enactments as valid; and the rule against the extra-territorial operation of Statutes is a rule of interpretation merely, overruled by any clear indication of the intention of Parliament to apply an Act to persons or things outside of the British Dominions. The territorial limitation on a Colonial Legislature, however, is more than a rule of interpretation; it is a rule in restraint of power, sanctioned not merely by the refusal of foreign Courts to recognise rights acquired or acts done under it, but by the refusal of the Courts of the colony itself to treat the enactment as valid. This is the general, but not the universal, opinion as to the nature of the power of a Colonial Legislature.[1] Many of the cases relied on for the opinion in question are

[1] See *Low* v. *Routledge* [1865], L.R. 1 Ch. 42; *M'Leod* v. *Att.-Gen. for New South Wales* [1891], A.C. 339; and see the Colonial cases collected and discussed by Mr. Lefroy in his *Legislative Power in Canada.*

unsatisfactory, in that they are decisions not of Courts of the colony whose power is in question, but of an English Court or the Court of another colony, asked to recognise and give effect to the law on grounds of comity. And, adopting the opinion in question, we find no certain test of what is "legislation for the colony."[1]

The narrow view by which Parliament has sometimes been moved as to the powers of Colonial Legislatures is manifested by the Acts passed from time to time to enlarge their powers in special cases: *e.g.*, 23 & 24 Vict., No. 122, enables Colonial Legislatures to enact that where any person feloniously injured within the colony shall die beyond the limits of the colony, the offence may be dealt with in the colony where the injury was inflicted. Other Acts enable Colonial Legislatures to make laws having a true operation outside their limits, (*a*) as enabling acts of authority to be done, or jurisdiction to be exercised in respect of acts done or things happening out of the colony—*e.g.* the Colonial Prisoners' Removal Act, 1869; the Colonial Naval Defence Act, 1865; the Merchant Shipping Act, 1894, ss. 478 (Colonial Inquiries), 736 (Coastal Trade); or (*b*) as giving to Acts of the Colonial Legislature the force of law throughout the British Dominions—*e.g.* 28 & 29 Vict., No. 64—an Act to remove doubts respecting the validity of certain marriages contracted in Her Majesty's possessions abroad. This is generally effected by an Order in Council made in pursuance of the enabling Imperial Act.

(*c*) The territorial boundaries set to a colony, whether by the Crown or by an Act of Parliament, and, *prima facie*, the constitution of a colony, bind the Legislature of the colony.[2] As far as the constitution is concerned, special power has been given in the Constitution Acts of the Australian Colonies to alter the constitution subject to the observance of certain forms; and by the Colonial Laws' Validity Act, 1865, s. 5, every representative Legislature has, and is deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature, to establish and reconstitute Courts, and to make provision for the administration of justice therein. As to the territory of the Colonies, this also is the subject of special provision in the Constitution Acts, having in view the great extent of New South Wales, South Australia, and Western Australia; and very naturally the power of subdivision was subject to limitations left in the hands of the Crown acting on the advice of the Imperial Ministry. In 1895 the Imperial Parliament passed the Colonial Boundaries Act, which, while conferring general powers of severance and delimitation on the Crown, provides that in a case of colonies with responsible government, which are set out in a schedule and include all the Australian Colonies, the power shall not be exercised except with the consent of the colony.

(*d*) The "local and territorial" nature of Colonial Legislatures has been

[1] Cf. *M'Leod* v. *Att.-Gen. for New South Wales*, and *Ashbury* v. *Ellis* [1893], A.C. 339.

[2] Cf. *Reg.* v. *Burah* [1878], L.R. 3 A.C. 889, *per* Lord Selborne, at p. 905.

regarded as implying the reservation of certain matters in which there must be one law for the Empire, or which fell within an Imperial rather than a local policy. Such matters are of course generally the subject of Imperial legislation, so that any Colonial Act thereon would be overridden by the Act of the paramount authority; but the opinion in question is that the matters referred to are excluded from the area of Colonial power, and that an Act of the Legislature under the more general power to make laws for the possession would be *ultra vires*.

Colonial Acts conferring upon aliens the privileges of British subjects within the possession are the most common illustration of matters of this class, as is seen from Chalmers's *Opinions*. Sometimes the law officers allowed them to pass, more often they were disallowed, as beyond the province of a colony. At last 10 & 11 Vict., No. 83, was passed to quieten doubts, and, besides confirming Colonial Acts of Naturalisation, conferred the power of local naturalisation upon all Colonial Legislatures, a power continued by the Naturalisation Act, 1870, s. 16. In their fiscal and commercial policy, in the regulation of shipping and the jurisdiction of Admiralty, the Colonies came at the outset under a political system which treated these matters as Imperial. As the older policy has been abandoned, it has generally not been deemed sufficient to repeal the paramount Imperial Acts; power of legislation has been specially conferred. In regard to duties of customs, the restrictions which accompanied the grant of representative institutions to the Australian Colonies by 13 & 14 Vict., No. 59, have been removed by 36 & 37 Vict., No. 22, and 58 Vict., No. 3. The special powers to make laws as to the coasting-trade and certain other matters of shipping are due partly no doubt to the "territorial" limitations on the Legislature, but partly also to the opinion that the regulation of trade was essentially Imperial. The same may be said of naval defence; for the Colonial Naval Defence Act of 1865, though in supplement of the territorial powers of the Colonial Legislatures, also authorises the proper legislative authority to make provision for maintaining discipline among the men and officers while ashore or afloat within the limits of the colony. The Court of the Vice-Admiral in a colony has always been a branch of the Admiralty, and outside the Colonial system of Courts and jurisdiction. The Court, its judge and jurisdiction alike, have been regulated by Imperial and not by Colonial Statutes and Orders. In 1890, however, by the Colonial Courts of Admiralty Act, it was provided that every Court of law in any colony declared in pursuance of the Act to be a Court of Admiralty, and, in the absence of such declaration, every Court with unlimited civil jurisdiction, should have the same Admiralty jurisdiction as the High Court in England; and (s. 3) the Legislature of any British possession may declare any of its Courts of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and may limit territorially or otherwise its Admiralty jurisdiction, and may vest partial or limited jurisdiction in any inferior or subordinate Court. The

Legislature may not, however, confer any jurisdiction not by the Act conferred upon a Colonial Court of Admiralty.

The view that for some matters the Colonial Legislature does not possess the power even of internal legislation has thus been a reason for conferring special powers. Whether it is well founded has never been authoritatively decided. But if it was a correct opinion, its effect does not appear to be altered by the Colonial Laws' Validity Act, for that Act deals merely with the ground of repugnancy to the law of England; and, as was pointed out[1] many years ago, the objection of "repugnancy" is one thing, the objection of "want of power" is another.

(6) **Rules under Acts of Colonial Legislature.**—Rules, Orders, and Regulations issued by some authority within the colony under powers conferred by the Colonial Legislature—*e.g.* the Governor-in-Council—are hardly to be regarded as an independent source of law. But the Governor has power under some Imperial Acts to issue proclamations, making regulations upon certain matters—*e.g.* the Merchant Shipping Act, 1894, ss. 366, 367; and "every such proclamation shall have effect without as well as within such possession as if enacted in this part of this Act."

[1] See *Papers of the Juridical Society*, vol. iii., "Competence of Colonial Legislatures to Enact Laws in Derogation of Common Right," by T. C. Anstey.

MODES OF LEGISLATION IN THE BRITISH EMPIRE: NEWFOUNDLAND.

[*Contributed by* Sir J. S. Winter, K.C.M.G.]

I.—Common Law as the Basis of Statute Law.

(*a*) *What is the Common Law of the colony? Under what circumstances and by what authority was it introduced?*

The Common Law of the colony is the Common Law of England, introduced by the colonisation and settlement of the colony.

(*b*) *Is there any law applicable exclusively to particular races or creeds?*

There is no law applying exclusively to any particular races or creeds.

II.—Statute Law.

(*a*) *Of what does the Statutory or Enacted Law of the Colony consist? To what extent is it embodied in Charters, Regulations, Orders in Council, Ordinances, or Acts?*

The Statutory or Enacted Law of the colony consists of the Acts of the Colonial Legislature, the first session of which was held in the year 1833 (3 Wil. IV.). Under the authority of these Statutes there are various subordinate methods of legislation—*e.g.* Proclamations of the Governor, Orders, Regulations, etc., made by the Governor in Council, municipal authorities, magistrates, public health officers, etc.

(*b*) *To what extent do the Statutes of the United Kingdom operate in the colony by virtue of either—*

(i) *Original extension of English law to the colony;*

(ii) *Express provisions of any Order in Council or Charter; or,*

(iii) *Express adoption by the Legislature of the colony?*

The Statute Law of England, which was in force down to the year 1833 (the year in which the Local Legislature began to enact laws), is in force in the colony, so far as it is applicable to local circumstances. The Statute Law of England in relation to criminal matters comes into operation in the colony one year after its enactment, under the provisions of a Local Statute passed in the year 1837 (1 Vict., No. 4). There are also in force in the

colony various Statutes of the Imperial Parliament, which by their own express provisions are made to apply to the colony. As regards Imperial Statute Law generally, the Local Legislature has always endeavoured to follow or copy Imperial legislation in all important matters, so far as applicable to the colony, and with such modifications as local circumstances require.

(*c*) *Is the Statute Law of any other colony in force in the colony?*

No.

(*d*) *Is any code of enacted law of non-British origin in force in the colony?*

No.

III.—Methods of Legislation.

(*a*) *By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed, to whom is he responsible, and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the Legislative body?*

There is an official draftsman called the Law Clerk of the Legislature, appointed by and responsible to the Governor in Council. His duties are to draft all Bills introduced into both branches, including those introduced by private members; but in practice measures are frequently drafted by private members, with or without the assistance of the Law Clerk. He has no staff or assistants. The Minister of Justice has a general supervision of all legislation, and particularly of Government measures.

(*b*) *What is the constitution of the Legislative Chamber or Chambers through which measures have to pass? If there are two Chambers, may measures be introduced in either?*

There are two Chambers, or Houses. The Upper House is called the Legislative Council, the members of which are appointed by Her Majesty for life; the Lower House, or House of Assembly, is a representative body. Measures may be introduced in either branch. The colony has responsible government, and the principles as well as the procedure governing legislation are with some few exceptions the same as those in force in the Imperial Legislature.

(*c*) *Are draft measures published before introduction, or before any other stage? If so, under what rules?*

No.

(*d*) *Through what stages does a measure pass before it becomes law?*

First and second readings, Committee of the whole House, and third reading, in both branches, after which the assent of the Governor, or, in the case of measures reserved therefore by the Governor, the Royal assent.

(*e*) *Is there any opportunity afforded for referring measures, while in course*

of passage through the Legislature, to any special officer or committee on points of form?

Not by any Standing Rule or Order. The rule and practice are similar to those of the Imperial Parliament.

(*f*) *Have any steps been taken to secure uniformity of language, style, or arrangement of Statutes, either by means of a measure corresponding to "Brougham's Act" (13 & 14 Vict., No. 21) or by official instruction or otherwise?*

There is an Act (No. 1 of the Local "Consolidated Statutes," second series) entitled, "Of the Promulgation and Construction of Statutes," which prescribes the methods by which Statutes are promulgated, and rules for the construction of Statutes, among which latter are various provisions copied in substance from "Brougham's Act" and the Interpretation Act, 1889.

(*g*) *Is there an annual session of the Legislature? Are there any fixed or customary periods of session?*

There are no periods of session fixed by any positive law; but the invariable custom has been to hold an annual session, which usually opens in the month of February.

(*h*) *How are the Acts or Ordinances of the colony numbered or distinguished? Are they numbered by reference to the calendar year or to the regnal year, or in any other way? Is it the practice to confer for convenience of citation a "short title" on each Act or Ordinance? How long has this practice been followed?*

The Acts of the colony are numbered in reference to the regnal year. The custom has recently grown up of giving a "short title" to important or comprehensive measures.

(*i*) *Are Private Bills (if any) treated separately and under different conditions from Public Bills? On what principle is the line drawn between Public and Private Bills? Are Private Acts or Ordinances separately numbered?*

Private Bills require previous public notice of application, and the application is referred to a Select Committee. If the Committee reports in favour of the Bill, it passes through the same stages as a Public Bill. Private Bills are published and promulgated in the same manner as Public Bills, and numbered and included in the same annual volume.

(*j*) *Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?*

No.

IV.—Publication of Statutes.

(*a*) *In what manner and under what authority are Statutes promulgated? What evidence is accepted of a Statute having been duly passed?*

Publication in the *Royal Gazette* of the colony, or printing by the Queen's Printer, is a promulgation of the Act, and evidence of its having been passed.

(*b*) *In what form or forms, and under what authority, are Statutes printed for publication?*

First in the *Royal Gazette* of the colony, by direction of the Governor, and afterwards by the Queen's Printer, both separately and in a collected form or volume.

(*c*) *Are the Statutes of each session published in a collected form at the end of the session?*

Yes.

(*d*) *Are the periodical volumes of Statutes accompanied by*

(i) *An index and table of contents;*

(ii) *A table showing the effect on previous legislation?*

There is a table of contents with each volume, but no index or table showing the effect on previous legislation.

(*e*) *What collective editions (if any) of the Statute Law of the colony have been published, and whether by the Government or by private enterprise? Are these or any of them periodicals? Do such editions comprise those Acts of the United Kingdom in force in the colony?*

No such collective edition, except the consolidations of the Statutes hereafter referred to.

(*f*) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Practical Utility"?*

No.

(*g*) *How are Private Acts published?*

In the same manner as Public Acts.

V.—Revision of Statutes.

(*a*) *Have any steps been taken for the revision and expurgation of the Statute Law, whether periodically or otherwise? What machinery (if any) exists for this purpose?*

The Consolidation of the Statutes referred to in the answers to Part VII., hereafter, necessarily involved revision and expurgation.

(*b*) *Is there any edition of "Revised Statutes" showing these actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition?*

None except the "Consolidated Statutes," hereafter described.

VI.—Indexing of Statute Law.

Is there any general index to the Statute Law of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both Public and Private Acts and Ordinances and the Statutes of the United Kingdom which are in force in the colony? Is it accompanied by any

table showing how each Statute has been dealt with? What is the date of the latest edition?

There is no such general index.

VII.—Consolidation and Codification.

(*a*) *What steps have been taken to consolidate the whole or particular parts of the Statute Law, or to codify any branches of the law?*

There have been two consolidations of the whole Statute Law of the colony, one down to and including the year 1872, and one down to and including the year 1892. These consolidations were passed through the Legislature in each case as a Bill, going through all its stages, and a revision of and amendments upon previous legislation were embodied in the consolidated measure. Each consolidation operated as a repeal of all previous and separate Statutes. In addition to these consolidations several of the most important Imperial Statutes, codifying the law upon particular subjects, have been copied and enacted by the Local Legislature.

(*b*) *Does any machinery exist for this purpose? Is the work now in progress?*

No permanent machinery for such work exists, nor is any such work now in progress.

(*c*) *What "codes" are now in force in the colony? When and by whom were they prepared, and on what materials were they based?*

None but those referred to in the next preceding answer.

VIII.—Subordinate Legislation.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as Rules and Orders made by the Governor, or a minister or department under the express authority of Statute or Ordinance? Is there any, and what collection of, or index to, such subordinate measures?

There is no permanent or uniform machinery for such subordinate legislation. The machinery is prescribed in each case by the Statute authorising the particular subordinate legislation. There is no collection of, or index to, the subordinate measures

RECENT LEGISLATION ON INEBRIATES IN ENGLAND AND THE COLONIES.

[*Contributed by* ERNEST M. POLLOCK, ESQ., *and* A. M. LATTER, ESQ.]

Progress of the Movement.—Special legislation for the treatment of inebriates has recently advanced beyond the stage of discussion, and has been adopted both at home and in the Colonies. The original foundation of action in the matter was laid in England, but the principle underlying the whole treatment has been fully developed in the Colonies alone.

The legislation in the Colonies on this question strikes very deep into the theories of the responsibility of the State for its members and of the responsibility of the individual for his own actions. The English legislation deals only with the first of these.

The Habitual Drunkards Act was passed in England in 1879 (42 & 43 Vict., No. 19), and was tentative only, and to that end its duration was limited to ten years. The importance of the measure as a step in the path of progress, rather than its value in actual administration, secured its continuation beyond the original time limit, and by the Inebriates Act, 1888, 51 & 52 Vict., No. 19, it was made perpetual. Subsequently the Inebriates Act, 1898, was passed (61 & 62 Vict., No. 60), and by s. 30 is to be construed as one with the previous Acts of 1879 and 1888, the three forming the Inebriates Acts, 1879 to 1898.

In 1896 the Inebriates Act, No. 32, was passed by the Legislature of the Cape of Good Hope. The effect of this Act is largely the same as that of our own Act of 1879; but "inebriate" is interpreted to mean "a man who is by reason of habitual intemperate drinking of intoxicating "liquor, or habitual intemperate use of anæsthetics or narcotics, at times "dangerous to himself or others, or incapable of managing himself or his "affairs." In the same year (1896) Queensland passed an Act (No. 14) of great importance, and in 1898 New Zealand passed the Inebriates' Institutions Act, No. 8; while in the same year a Bill was originated in, and passed, the Legislative Council of New South Wales, ready for presentation to the Legislative Assembly for its concurrence. This does not yet appear to have been obtained, possibly because the legislation necessary to the Commonwealth scheme made too great inroads upon the time of the Assembly.

Home Legislation.—Dealing first with the home legislation, under the Act of 1879 no inebriate is admitted to a retreat except on his own application. Whenever admitted, he may lawfully be detained; but no order for detention is to exceed a period of twelve months. The result, therefore, of legislation as it stood until the last few years may be summed up as merely giving a summary method of enforcing the agreement entered into by the inebriate of his own free will.

The Act of 1898 extended the limit of detention to two years, and made a great advance on the purely voluntary system. In reality it amounts to a recognition by the State of its duty to treat offences arising from habitual drunkenness in as distinct a manner as those arising from lunacy. By this Act the provisions for the treatment of voluntary inebriates under the earlier Act were improved and their readmission to retreats facilitated. By s. 1, sub-s. 1, "When a person is convicted on indictment of an offence "punishable with imprisonment or penal servitude, if the Court is satisfied "from the evidence that the offence was committed under the influence of "drink, or that drunkenness was a contributory cause of the offence, and "the offender admits that he is, or is found by the jury to be, a habitual "drunkard, the Court may, in addition to or in substitution for any other "sentence, order that he be detained, for a term not exceeding three years, "in any State inebriate reformatory, or in any certified inebriate reformatory, "the manager of which is willing to receive him." Further, a person who commits any of certain offences specified in the Schedule which may be summarised as offences arising from conduct while drunk, and who has in the previous twelve months been convicted three times of such offences, and "who is a habitual drunkard," may be detained for a term not exceeding three years in a certified inebriate reformatory.

Retreats are licensed by the County Council, and the reformatories of both classes by the Secretary of State. But whereas State reformatories are to be built by the Secretary of State, with the approval of the Treasury, out of the funds provided by Parliament, certified reformatories may, by leave of the Secretary of State, be built and supported by local bodies or private persons, and their expenses be defrayed by the local body, power being left to the Treasury itself to contribute.

The definition of "habitual drunkard" is (s. 3 of Act of 1879) "a "person who, not being amenable to any jurisdiction in lunacy, is, notwith- "standing, by reason of habitual intemperate drinking of intoxicating liquor, "at times dangerous to himself or herself or to others, or incapable of managing "himself or his affairs." This does not include intemperance from the opium or morphia habit, and probably "intoxicating liquor" would be interpreted to include only the commonly used alcoholic liquors.

Its Governing Principle.—The English legislation, therefore, shortly put, amounts in principle to this: the drunkard, if and so far as he commits an offence against the penal code of the State which is caused or

contributed to by his intemperance is, like the lunatic, recognised, and is subjected to preventive as well as punitive treatment for his actions. But there is no such thing in England as the status of a drunkard, as there is of the lunatic; and the relations or friends of a profligate, as distinguished from a criminal drunkard, have no remedy against him unless or until his excesses bring him within s. 116 of the Lunacy Act of 1890.

Colonial Legislation.—On these points, both as to the interpretation of an "inebriate" and as to the investment of the relations and friends of an inebriate with a power of action, the Colonies have adopted a much wider policy. The root distinction between their legislation and ours lies in this, that theirs starts from the narrower province of the relations of the State and its members and deals with the broad question of the responsibility of the individual in certain circumstances.

Queensland.—The Queensland Act (No. 14) was passed in 1896, and is divided into three parts. Part I. contains the interpretation clauses, and by these the Act applies to persons who have been habitually intemperate in the use of intoxicants or drugs, which are interpreted to include opium, morphia, cocaine, chloral, or any other drug capable of producing mental aberration. Part III. provides regulations for retreats. Part II. enacts that an inebriate may, on the inebriate's own application, or on that of her husband or his wife, as the case may be, or on that of any relation or friend, be taken into a licensed retreat for a period not exceeding twelve months. The application by a relation or friend may be made to a judge of the Supreme Court or a District Court, or to two justices, one being a police magistrate. The procedure on such an application is curious. If the application is proved to be "reasonable," the Court may summon the alleged inebriate to show cause why he should not be committed to an institution for inebriates (s. 7). If, on the hearing of the summons in the presence or absence of the alleged inebriate, it appears that by reason of the excessive use by him of intoxicating drinks or drugs he is (1) unable to control himself or incapable of managing his affairs, or (2) dangerous to himself or others, or (3) suffering or recovering from delirium tremens, or in imminent danger of death from the continuous use of such drinks or of drugs, and it is also certified by two medical men that the inebriate requires curative treatment, or it is proved that he has not less than five convictions already recorded against him for being found drunk on licensed premises or in a public place, the Court may make an order for his detention in an institution for a period not exceeding twelve months. The order for the detention of the drunkard may be rescinded or renewed. Provision is also made for payment to be made by the inebriate for the expense of his detention and the method of its recovery.

New Zealand.—Practically the same provisions have been adopted by the New Zealand Act of 1898, No. 8. The interpretation of "inebriate"

includes a person rendered such by the use of drugs, and its provisions may be set in motion by a husband or wife or relation or friend.

New South Wales.—The New South Wales Bill has not yet passed into law, but as it has passed the Legislative Council its provisions deserve notice. By s. 1 of this Act the class of persons who may make an application is not quite so wide as "any relation or friend," but is stated to be the husband, wife, parent, brother, sister, son or daughter of full age, and includes a partner in business of the inebriate. The application may also be made by the inebriate himself (provided, as in all the other cases, that he is at the time sober), or by his medical attendant, or by a member of the police force above a certain rank, or by a justice of the peace. The application is to be made to a judge of the Supreme Court or a District Court, or the Master in Lunacy, or any stipendiary or police magistrate; and the period of detention is not to exceed twelve months. The detention may be either in a licensed institution or in the charge merely of attendants under the control of the judge, master, or magistrate; but no order for detention is to be made except on the personal inspection of the judge, master, or magistrate, and on the certificate of a medical man, together with corroborative evidence by some other person. By s. 4 the same authorities may make an order as to the management of the inebriate's property; and by s. 5 the Supreme Court in its lunacy jurisdiction may make all the orders concerning the same as though the inebriate were a lunatic inside the New South Wales Lunacy Act, 1898. Not among the least wise of the provisions of this Act is s. 12, in which publication of these proceedings before the Court in these cases is forbidden—a step in the direction of s. 6, sub-s. 3, of the English Lunacy Act by which the secrecy of the petition is absolutely secured.

The Theory of Colonial Legislation.—Granted that the principle on which the Colonial legislation is based is correct—namely, that there is a point at which a man ceases to be a free agent, and without committing any criminal offence yet renders himself dangerous to others and himself—due provision seems to have been made for the liberty of the subject. There are two checks on any rash, unsuitable, or unjust attempt to order the detention of any man. The first is the personal inspection of the inebriate by the Court; and the sense and integrity of the tribunal must of course be always assumed. The second is the certificate of the medical man or men; and care is taken that this certificate does not proceed from any interested or tainted source. No order is to be made for the confinement of an inebriate in which the medical man giving the certificate is in the very remotest degree interested.

Duration of Detention and Discipline.—There is one point on which the more halting legislation of the mother country contains a useful suggestion. The Act of 1898, as has been mentioned, extended the period for which a patient under the Act of 1879 might be detained from one year to two years.

None of the Colonies permit the period to exceed twelve months, although the Queensland Legislature has made provision for renewal. It is very doubtful whether in the case of either alcohol or other drugs the period is sufficiently long, and in any case provision for the renewal of the term might, it seems, be usefully granted on the application of the same persons as those qualified originally to apply.

The English and Colonial Acts all contain similar provisions for the management and discipline of the reformatories or homes. These contain powers to recapture escaped inebriates and punish the attendants for supplying the means of inebriation. But these provisions are essentially details which do not affect the broader issues involved in this question.

It will be interesting to note how far the provisions of the Colonial Acts are resorted to in cases where narcotics or drugs are the intoxicants, and with what results.

PRELIMINARY EXAMINATION OF PATENTS AND COMPULSORY LICENCES.

[*Contributed by* A. Wood Renton, Esq.]

I.

The recent appointment by the Board of Trade of a Committee to enquire into and report upon, *inter alia*, the questions

(i) whether any and what additional powers should be given to the Patent Office to (*a*) control, (*b*) impose conditions on, or (*c*) otherwise limit the issue of letters patent in respect of inventions which are obviously old, or which the information recorded in the Office shows to have been previously protected by letters patent in this country;
(ii) whether any, and if so, what, amendments are necessary in the provisions of s. 22[1] of the Patents, etc., Act, 1883,

may render a summary of the provisions of colonial and foreign law in regard to these matters of some interest. The reference to the Committee, indeed, expressly excludes from its consideration the subject of any general system of examination as to the novelty of inventions in respect of which letters patent are granted. This exclusion represents what has long been the official view in England (cp. *Parl. Pap.*, 1873, No. 741, p. 238). But, as will be seen immediately, the preliminary examination into novelty assumes a variety of suggestive forms; and it is, after all, the most popular solution which experience has supplied of the problem how to prevent "the issue of letters patent in respect of inventions which are obviously old." No apology is offered, therefore, for assigning to it a place of some prominence in the following summary, although the terms of the reference make any detailed discussion of the question of preliminary examination superfluous.

In dealing with compulsory licences it will be necessary to take account of the closely allied methods whereby many countries seek to confine within narrow limits the interference by exclusive privileges with national industry

[1] S. 22 enables the Board of Trade to order the grant of compulsory licences of a patent, if it is proved that, by default of the patentee, (*a*) the patent is not being worked in the United Kingdom, or (*b*) the reasonable requirements of the public with respect to the invention cannot be supplied, or (*c*) any person is prevented from working or using to the best advantage an invention of which he is possessed.

—*viz.*, the imposition upon patentees (usually under a penalty of being deprived of their rights on default) of obligations

(i) to bring their patented inventions into use in the countries granting the patents within a certain period ("compulsory working": *exploitation*);

(ii) not to discontinue such working for more than a certain period during the patent-term;

(iii) not to import, into the countries granting their patents, articles manufactured under such patents elsewhere.

It should be premised that under the International Convention of 1883 for the Protection of Industrial Property free importation of patented articles into all the States of the union without the penalty of forfeiture is now allowed, but the patentee remains bound to "work" his patent in conformity with the laws of the country into which he introduces the patented articles (Art. 5).

We may now proceed, first, to deal successively, on the lines above indicated, with the laws of the COLONIES (II.), and of FOREIGN COUNTRIES (III.), and then to endeavour to sum up the results of the enquiry in a few CONCLUDING OBSERVATIONS (IV.).

I have used for the purpose of the following summaries, besides the official texts of the various laws wherever these were available, the admirable volumes of *Patent Laws of the World*, edited by Mr. E. Carpmael, and published under the auspices of the Chartered Institute of Patent Agents; and, to some extent, the *Annuaire de Législation Étrangère*, many of the annotations in which are most valuable.

II.—THE COLONIES.

Australia—*New South Wales* (No. 19 of 1899).—Petitions for letters patent are referred by the Minister of Justice to the Examiner of Patents for report; and if the Examiner reports that "he approves of the prayer of the petitioner" (s. 5 [1]), letters patent may be granted. There are no provisions for

(*a*) preliminary examination into novelty,

(*b*) compulsory working,

(*c*) forfeiture or revocation on the ground of discontinuance,

(*d*) compulsory licences, or

(*e*) as to the importation of patented articles.

—— *Queensland* (No. 13 of 1884, No. 5 of 1886).—It is the duty of the Examiner to report, *inter alia*, whether any of the following conditions exist with regard to an invention sought to be patented:

(*a*) That it is not novel;

(*b*) That it is already in the possession of the public with the consent or allowance of the inventor;

(*c*) That the invention has been described in a book or other printed publication, published in Queensland before the date of the application, or is otherwise in the possession of the public;

(*d*) That the invention has already been patented in Queensland (No. 5 of 1886, s. 7 [1]).

If the Examiner reports that any such condition exists, the Registrar may refuse to accept the application or specification or to recommend the grant of a patent (s. 7 [2]), giving notice of refusal to the applicant, who has a right of appeal to the Law Officer (s. 7 [3, 4]). The Law Officer may obtain the assistance of an expert, to whom the applicant is to pay such remuneration as the Law Officer appoints (s. 7 [5]). S. 25 of No. 13 of 1884 gives the Governor in Council power to order the grant of compulsory licences in terms substantially identical with those of s. 22 of the Imperial Act. There is no provision for

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) as to the importation of patented articles.

General power is given to the Registrar to refuse to grant a patent "the use of which would, in his opinion, be contrary to law or morality" (No. 13 of 1884, s. 84).

—— *South Australia* (No. 78 of 1877).—The Commissioner of Patents may refer any petition for a patent, whether opposed or not, to one or more competent persons for enquiry and report (s. 25). The determination of the Commissioner on any such case is final, but the applicant is entitled, on giving four weeks' previous notice in the Government *Gazette* of his intention so to do, to make one or more fresh applications for a patent in respect of the same invention (s. 26). This latter provision rather points to the enquiry of the Examiner being restricted to questions of formal sufficiency. There are no express provisions as to

(i) forfeiture or revocation on the ground of discontinuance,

(ii) compulsory licences, or

(iii) importation of patented articles;

but the Government may revoke a patent if it appear that within three years from its date the patentee or his assignee or licensee has not used the patented invention to a reasonable extent for the public benefit (s. 48). The Government may use a patented invention on terms (s. 36). The prerogative of the Crown in regard to granting or withholding patents is preserved in very comprehensive terms (s. 32).

—— *Victoria* (No. 1123 of 1890).—Every application is referred by the Commissioner of Patents to an Examiner to report, *inter alia*, "whether, to the best of the knowledge of such Examiner, such invention is not novel or is already in the possession of the public with the consent and allowance of the true and first inventor" (s. 9). On an adverse report by the Examiner, the Commissioner may refuse the application, subject

to an appeal to the Law Officer (s. 10). There are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance,

(iii) compulsory licences, or

(iv) importation of patented articles ;

but the Commissioner may direct the insertion of all such conditions, restrictions, and provisions as he may deem useful and expedient or necessary (s. 16), and the Governor in Council has power to withhold a patent and order the specification to be cancelled (s. 73 [2]). There is also a general power to refuse a patent where the use of the invention would be contrary to law (s. 64). The Government may use the invention on terms (s. 48).

—— *Western Australia* (No. 5 of 1888).—There is no preliminary examination into novelty. As to the scope of the Examiner's duties, see s. 9. Compulsory licences may be ordered by the Governor in Council on terms identical with those of the Imperial Act (see s. 27). There are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) as to importation of patented articles.

The Government may use the invention on terms (s. 32).

See also NEW ZEALAND and TASMANIA.

Bahama Islands (52 Vict., No. 23 ; 53 Vict., No. 2 ; 54 Vict., No. 12). —There is no preliminary examination into novelty. Under s. 11 of the principal Act (52 Vict., No. 23), the invention had to be brought into operation within three years ; but that provision was repealed by 54 Vict., No. 12, s. 6. Compulsory licences may be ordered to be granted by the Governor in Council on terms substantially identical with those of s. 22 of the Imperial Act (see s. 7). There is no provision as to

(i) importation of patented articles by the patentee, or

(ii) forfeiture or revocation on the ground of discontinuance of working.

Barbados (Patent Act, 1883 ; No 37 of 1892-93).—There is no preliminary examination into novelty, nor any provision as to compulsory licences or forfeiture or revocation on the ground of discontinuance ; but (Act of 1883, s. 9 ; No. 37 of 1892-93, s. 33) the exclusive right ceases if the invention is not brought into operation within a period of seven years.

Bermuda.—There is no statutory patent law in Bermuda.

British Guiana (No. 1 of 1861).—Applications are referred for examination and report to the Attorney-General, who is at liberty, in examining the provisional specification,[1] to call to his aid "such scientific or other person as he may think fit," at such remuneration as he may appoint (s. 5 [1]). It

[1] The complete specification is to be filed within six months of the grant of the letters patent (s. 14 [1]), unless (s. 6) the inventor chooses to deposit it in the first instance in lieu of the provisional.

is in every case "entirely at the hazard of the petitioner whether the invention is new or will have the desired effect" (s. 5 [2]). There is no provision for

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) compulsory licences, or

(iv) prohibiting the importation of patented articles by the patentee;

but a patent is declared to be void if the "patentee, his heirs, executors, administrators, or assigns does or do not supply or cause to be supplied for Her Majesty's service in [the Colony] all such articles of the said invention as he or they may be required to supply by the officers administering departments of Her Majesty's service in [the Colony] for the use of which the same is required, in such manner, at such times, and at and upon such reasonable prices and terms as may be settled for that purpose by the Governor" (s. 14 [1]).

British Honduras (Law of September 10, 1862; 26 Vict., Sess. 1, No. 2; *Consolidated Laws of British Honduras*, Part xxvi., c. 74).—Applications are referred for examination to the Attorney-General, who, as in the case of BRITISH GUIANA (*sup.*), has power to call in some "scientific or other person" to assist him, and cause such remuneration to be paid to that person as he may appoint (ss. 6, 7). There is no preliminary examination into novelty, and there is no provision for

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance,

(iii) compulsory licences, or

(iv) as to the importation of patented articles by the patentee.

British India (No. 5 of 1888).—There is no express provision for preliminary examination into novelty; but under s. 6 (2) the Governor-General in Council, before making an order authorising an applicant to file a specification of his invention, "may direct that the application be referred for enquiry and report to any person whom he thinks fit," and who (s. 6 [3]), if not in the service of the Government, is to receive such fee as the Governor-General in Council, after considering the report, may determine. A rule may be applied for to a High Court to show cause why an exclusive privilege in respect of an invention (s. 30), or part of an invention (s. 31), should not be declared not to have been acquired on the grounds, *inter alia*, of want of utility or of novelty. Notice of the rule is to be served on all persons appearing from "the address-book" (as to which see s. 13 [1]) to be proprietors of the exclusive privilege, or to have shares or interests therein (s. 34 [1]), and the High Court to which application for the rule is made may direct an issue to be tried before itself or another High Court or District Court (s. 35, and see further, as to subsequent proceedings, ss. 36, 40). There is no provision for

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) as to the importation of patented articles by the patentee,

but compulsory licences may be ordered (s. 43, which is practically a transcript of s. 22 of the Imperial Act).

British New Guinea.—By s. 2 and Schedule A of the Courts and Laws Adopting Ordinance (Amended) of 1889 (No. 6 of 1889), the following Queensland Acts and the rules made under them were adopted: No. 13 of 1884, and No. 5 of 1886 (see *sup.*, AUSTRALIA, *Queensland*).

British North Borneo.—The Straits Settlements (see *inf.*) Ordinance, No. 12 of 1871, is adopted (Proclamation No. 1 of 1887).

Canada (Stats. of Can., No. 61 of 1886; 55 & 56 Vict., c. 24).—The Commissioner of Patents may object to grant a patent in the following, among other, cases:

(i) When he is of opinion that the alleged invention is not patentable in law;

(ii) When it appears to him that the invention is already in the possession of the public, with the consent or allowance of the inventor;

(iii) When it appears to him that there is no novelty in the invention;

(iv) When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public (No. 61 of 1886, s. 16).

On each application for a patent a thorough and reliable examination is made by competent examiners appointed by the Patent Office for the purpose (55 & 56 Vict., c. 24, s. 8). When the Commissioner objects to grant a patent, he is to notify the applicant to that effect, and state the grounds of his decision with sufficient detail to enable the applicant to answer, if he can, the Commissioner's objection (No. 61 of 1886, s. 17), and the applicant may appeal, within six months after such notice, to the Governor in Council (s. 18). A patent is null and void at the end of two years from its date unless the patentee or his legal representatives or his assignee within that period, or any authorised extension of it, "commence, and after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented in such a manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada." Moreover, if, after the expiration of twelve months from the granting of a patent or any authorised extension of its term, the patentee or patentees or any of their representatives or assignees should import or cause to be imported into Canada the invention for which the patent is granted, such patent is void "as to the interest of the person or persons importing or causing to be imported as aforesaid." Questions arising under these provisions may be adjudicated upon by the Exchequer Court of Canada (without prejudice to the jurisdiction of any other Court)

upon information in the name of the Attorney-General of Canada or at the suit of any person interested (No. 61 of 1886, s. 37; 55 & 56 Vict., c. 24). The Government may use any patented invention on paying reasonable compensation to the patentee.

Cape of Good Hope (No. 17 of 1860).—The applicant, after depositing his specification at the office of the Colonial Secretary, gives notice to the Attorney-General of his intention to proceed with his application, and obtains an appointment for a hearing. At the hearing the Attorney-General "may call to his aid such scientific or other person or persons as he may think fit, and may, by writing under his hand, order to be paid to such person or persons some remuneration for his or their attendance" (s. 7). But there is no provision for

(i) compulsory working,
(ii) forfeiture or revocation on the ground of discontinuance,
(iii) compulsory licenses, or
(iv) as to importation of patented articles by the patentee.

Ceylon (No. 16 of 1892).—Before making an order authorising a petitioner to file a specification of his invention, "the Governor in Executive Council shall direct that the petition be referred for enquiry and report to any person whom he thinks fit" (s. 5 [2]), the petitioner being required to deposit such fee for the referee as the Governor in Executive Council may fix (s. 5 [3]). But the above enquiry appears to be limited, by implication (see s. 5 [5]), to questions of formal sufficiency. There is no provision as to

(i) compulsory working,
(ii) forfeiture or abandonment on the ground of discontinuance, or
(iii) as to the importation of patented articles by the patentee;

but an application to declare an exclusive privilege in an invention, or part of one, not to have been acquired, may be made under conditions practically identical with those stated *sup.* under British India (ss. 28, 29), and compulsory licences may be ordered (s. 39, substantially a transcript of s. 22 of the Imperial Act).

Channel Islands.—Patents granted under the Imperial Act of 1883 do not extend to the Channel Islands; grants already made at the commencement of that Act, and prolonged under it, do (see s. 113 and cp. *Brandon's Patent*, 1884, 9 App. Cas. 589). Arrangements for the extension of the Imperial Act to the Channel Islands have been proposed, but have not been carried out, and there is at present no statutory patent right for inventions n these islands. *Semble*, under s. 116 of the Imperial Act, which saves the royal prerogative "in relation to the granting of any letters patent," the Crown might include the Channel Islands in any such grant.

Falkland Islands.—There is no statutory patent law in the Falkland Islands.

Fiji (No. 3 of 1879).—There is no provision for

(i) preliminary examination into novelty,

(ii) compulsory working,
(iii) forfeiture or revocation on the ground of discontinuance,
(iv) compulsory licences, or
(v) as to importation of patented articles by the patentee.

The Attorney-General issues a provisional certificate protecting the invention (if he deems it *primâ facie* entitled to protection) for six months in like manner as by letters patent (s. 11), and an appeal lies from his refusal of such a certificate to the Governor in Council (s. 12). The Attorney-General may apply to the Supreme Court for cancellation or revocation of any letters patent on the grounds, *inter alia*, of lack of novelty or utility (s. 4). One month's notice at least of the Attorney-General's intention to proceed in this way is to be given by notice in the *Royal Gazette* (s. 20).

Gambia.—There is no statutory patent law in Gambia.

Gibraltar.—There is no statutory patent law, but special Ordinances are passed conferring exclusive privileges on inventors who have obtained patents for their inventions in the United Kingdom (cp. No. 5 of 1890; No. 1 of 1896; and No. 1 of 1898). The special Ordinance recites the grant of the patent under the Imperial Act and the inventor's petition that it may be extended, and then goes on to grant to the patentee, during the subsistence of his original patent, the same rights and privileges in Gibraltar as he enjoys in the United Kingdom. The Gibraltar patent is to terminate *ipso facto* with the original one, and the royal prerogative is saved. No. 1 of 1898 contains the following additional clause:

> Provided always that the said patentee shall supply, or cause to be supplied, for Her Majesty's service, all such articles of the said invention as may be required by the officers administering any department of Her Majesty's service in Gibraltar in such manner, at such times, and also upon such reasonable prices and terms as before or after the use thereof shall be agreed upon between those officers, with the approval of the Governor, and the patentee, or in default of such agreement, on such terms as may be settled by the Chief Justice in a summary manner after hearing all parties interested.

Gold Coast (No. 1 of 1900).—This Ordinance is, to a large extent, a transcript of the Imperial Act. There is no provision for

(i) preliminary examination into novelty,
(ii) compulsory working,
(iii) forfeiture of revocation on the ground of discontinuance, or
(iv) as to importation of patented articles by the patentee.

Compulsory licences may be ordered by the Governor in Council on terms practically identical with those prescribed by s. 22 of the Imperial Act (s. 25).

Hong-Kong (No. 2 of 1892).—There is no provision for

(i) preliminary examination into novelty,
(ii) compulsory working,
(iii) forfeiture or revocation on the ground of discontinuance,

(iv) compulsory licences, or

(v) as to importation of patented articles by the patentee.

The petition for letters patent is dealt with by the Governor in Council, who may "grant or refuse the prayer of the said petition as shall appear expedient" (s. 4).

Jamaica (No. 30 of 1857; No. 15 of 1891).—There is no provision for

(i) preliminary examination into novelty,

(ii) forfeiture or revocation on the ground of discontinuance,

(iii) compulsory licences, or

(iv) as to importation of patented articles by the patentee;

but the patent must, on pain of forfeiture, be brought into operation within two years after its date (No. 30 of 1857, s. 7). Petitions are referred to the Attorney-General, who may "call to his aid such scientific or other person as he may think fit," and cause to be paid to such person by the applicant such remuneration, not exceeding £5, as he may appoint. If the Attorney-General is satisfied that "the application is such as may properly be granted under the provisions of [the Act], and that the specification describes the nature of the invention, discovery, or improvement," he endorses his fiat on the petition; if not, he certifies the reasons of his refusal (s. 2 and No. 15 of 1891, s. 9). If it appears to the Attorney-General, *inter alia*, on reference of an application to him, that "in any way the requirements of the law have not been observed," he may require the application to be amended before proceeding with it (No 15 of 1891, s. 7). The patent law of Jamaica was extended to Turk's and Caicos Islands by No. 7 of 1897.

Lagos.—No statutory patent law exists.

Leeward Islands (No. 12 of 1876).—There is no provision for

(i) preliminary examination into novelty,

(ii) compulsory working,

(iii) forfeiture or revocation on the ground of discontinuance,

(iv) compulsory licences, or

(v) as to importation of patented articles by the patentee.

Applications are referred to the Attorney-General (s. 7), who may "call to his aid such scientific or other person as he may think fit," and cause to be paid to such person by the applicant such remuneration as he appoints. But "if the Attorney-General be satisfied that the provisional specification describes the nature of the invention, he shall allow the same and grant a certificate of his allowance, although he may require amendment if the title of the invention or the provisional specification is too large or insufficient" (s. 8). The patent is ultimately sealed under the Attorney-General's warrant (s. 15). The prerogative of the Crown in regard to the granting or withholding of letters patent is preserved by s. 16 in terms of unusual comprehensiveness. The Governor by warrant under his hand may direct

(*a*) the Attorney-General to withhold his warrant, or

(*b*) if the warrant has issued that the patent shall not be sealed, or
(*c*) that "any restrictions, conditions, or provisions" which he may think fit shall be inserted in any patent, or
(*d*) that any complete specification which may have been filed, and in respect of which no letters patent may have been granted, should be cancelled.

Malta (No. 11 of 1899).—There is no preliminary examination into novelty. But—a curious application of the principles involved in the ordinary rules as to compulsory working, forfeiture, or revocation on the ground of discontinuance, and compulsory licences—"the holder of a patent may be compelled to assign his right, or to grant the use thereof, for a consideration to be determined by the competent Civil Court, if the industrial invention or modification to which the patent refers shall not have been put into use within twelve months subsequent to the concession, or if its working shall have been suspended for twelve months continuously" (s. 50). There is no prohibition of the importation of patented articles by the patentee.

Mauritius (No. 16 of 1875).—There is no preliminary examination into novelty, and every patent is granted "without any warranty of any kind or nature whatsoever on the part of the Government" (s. 11). A patent may be withdrawn "if it be proved to the satisfaction of the Governor in Executive Council that the same or the mode in which it is exercised is mischievous to the Colony or generally prejudicial to the public" (s. 17). Proceedings similar to those mentioned *sup.* under British India may also be taken on motion to the Supreme Court to obtain the cancellation of patents, *inter alia*, on the grounds of lack of utility or novelty (ss. 29–34). There are no provisions as to

(i) compulsory working,
(ii) forfeiture or revocation on the ground of discontinuance,
(iii) compulsory licences, or
(iv) as to importation of patented articles by the patentee.

Natal (No. 4 of 1870; No. 2 of 1895).—There is no provision for

(i) preliminary examination into novelty,
(ii) compulsory working,
(iii) forfeiture or revocation on the ground of discontinuance,
(iv) compulsory licences, or
(v) as to the importation of patented articles by the patentee;

but the Attorney-General, before issuing his warrant for granting the patent, "shall direct the insertion in such letters patent of all such restrictions, conditions, and provisoes as he may deem usual and expedient in such grants, or necessary in pursuance of this law"[1] (No. 4 of 1870, s. 9), and

[1] The form of warrant is given in Sched. IV. to the Act. The material clause is as follows: "I am of opinion that as it is entirely at the hazard of the said applicant whether the said invention is new or will have the desired effect, Her Majesty's Royal

s. 10 empowers the Lieutenant-Governor to order the Attorney-General to withhold his warrant, etc., in terms similar to those stated above under LEEWARD ISLANDS.

Newfoundland (Consol. Stats., Tit. xii., c. 109).—There is no provision as to

(i) preliminary examination,
(ii) compulsory licences, or
(iii) forfeiture or cancellation on the ground of discontinuance;

but a patent becomes void if not brought into operation within two years (in the preliminary Table of Sections the time specified is twelve months) after its date (s. 12).

New Zealand (No. 12 of 1889; No. 8 of 1897).—There is no preliminary examination into novelty, and there are no provisions as to

(i) compulsory working,
(ii) forfeiture or revocation on the ground of discontinuance, or
(iii) importation of patented articles by the patentee;

but compulsory licences may be ordered by the Governor (No. 12 of 1889, s. 33, a transcript of s. 22 of the Imperial Act, and see No. 8 of 1897, Sched. I., *Form of Patent*).

St. Helena (No. 3 of 1872).—This Ordinance merely provides for the extension to St. Helena of patents granted in the United Kingdom. "All cases of doubt and difficulty not provided for by the ordinance or the local law" are to "be guided and governed so far as practicable by the law in force in England" (s. 5). There are no provisions as to

(i) preliminary examination into novelty,
(ii) compulsory working,
(iii) forfeiture or discontinuance on the ground of revocation, or
(iv) importation of patented articles by the patentee.

Sierra Leone.—There is no statutory patent law.

Straits Settlements (No. 12 of 1871).—There is no express provision for a preliminary examination into novelty, but under s. 8 the Governor may refer a petition for leave to file a specification "to any person or persons for enquiry and report," and may refuse to make an order "in any case in which it may appear to him that the granting of exclusive privileges would be prejudicial to the public interests or of doubtful public utility." Under s. 24 the Governor in Council may, by notification in the Government *Gazette*, determine a patent if, *inter alia*, either it or the mode in which it is exercised is mischievous to the State or generally prejudicial. There are provisions (ss. 31-34) similar to those set out above under BRITISH INDIA for an application to the Supreme Court to declare an exclusive privilege not to have been acquired on the ground, *inter alia*, of lack of novelty.

Tasmania (No. 6 of 1893).—There is no preliminary examination into

Letters Patent may be issued in the form contained in the fifth Schedule of the Patent Law with the following additional clauses (*here set them out, if any*)."

novelty in the ordinary sense of the term (see s. 12). But the Registrar may refuse to grant a patent *if he knows* that the invention is not new (s. 110). There are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Governor in Council (s. 36, a transcript of s. 22 of the Imperial Act).

Trinidad and Tobago (No. 40 of 1894 ; No. 11 of 1897).—There is no preliminary examination into novelty, and there are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) the importation of patented articles by the patentee ;

but the Supreme Court may order compulsory licences to be granted (No. 40 of 1894, s. 14, a transcript of s. 22 of the Imperial Act).

Turk's and Caicos Islands.—See JAMAICA (*sup.*).

Windward Islands :

Barbados.—See BARBADOS (*sup.*).

Grenada (No. 4 of 1898).—There is no preliminary examination into novelty. There are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) the importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Supreme Court (s. 32, a transcript of s. 22 of the Imperial Act).

St. Lucia (No. 14 of 1899).—There is no preliminary examination into novelty, and there are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered (s. 33, a transcript of s. 22 of the Imperial Act).

St. Vincent (No. 5 of 1898).—There is no preliminary examination into novelty, and there are no provisions as to

(i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or

(iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Supreme Court (s. 32, a transcript of s. 22 of the Imperial Act).

III.—FOREIGN COUNTRIES.

Algeria.—The French Law of July 5, 1844 (see FRANCE, *inf.*), applies. (Decree of June 5, 1850, Art. 1).

Argentine Republic (Law of October 11, 1864).—There is a preliminary examination into novelty by the Commissioner and sub-Commissioners (see Arts. 4, 13, and 20), with an appeal against the refusal of a patent to the Ministry of the Interior (Art. 25). A patent lapses if the invention which forms its subject is not worked within two years from the date of its issue, or if the working is interrupted for a like space of time, except in case of *force majeure* or excuse accepted by the Patent Office (Art. 47). No judicial declaration of lapsing is necessary to make the patented invention public property (Art. 49); but if the patentee disputes the fact, summary application may be made to the Court for such a declaration (see Arts. 50-52). There is no prohibition of the importation of patented goods by the patentee. Provision is made for compulsory licences (Arts. 29-31).

Austria (Law of January 11, 1897, promulgated January 28, 1897, came into force January 1, 1899).—The new Austrian Law bears a strong resemblance to that of GERMANY, *inf.* The application is submitted to a preliminary examination by a member of the Application Department (Art. 55)—a department of the Patent Office formed to deal, *inter alia*, with such matters (Art. 36). If the examination, which may be made with the assistance of experts, shows that there is obviously no patentable invention, the applicant (who may be summoned and heard by the Examiner) is informed of the fact, and the grounds of the Examiner's view, and is requested to reply to these within a specified time. After receiving such reply, or after the expiration of the prescribed time without any reply, the Application Department itself decides the question (Art. 55). The President of the Patent Office has the right to make rules as to the principles on which the preliminary examination is to be conducted, and in these rules special emphasis is to be placed on the fact that no decision on the *value* of an invention is to be given on the preliminary examination (*ib.*). An appeal lies to an Appeal Department of the Patent Office (no member of which has taken part in the decision appealed against), whose judgment apparently is final (see Art. 39). The refusal of the patent is to be published. A patent (other than a Government or War Office one) may be wholly or partially withdrawn if the patentee fail to work the invention for which it is granted, or allow it to be worked in Austria to a suitable extent or to do everything necessary to secure such working

(*a*) within three years from the date of the publication of the grant in the *Patent Journal*, or

(*b*) at an earlier time if the patentee is working the invention abroad and satisfying the Austrian demand mainly by importation (s. 27).

Where a patented invention of commercial importance cannot be utilised without using an invention protected by a prior patent of at least three years' standing directly connected with it, the owner of the former may obtain a compulsory licence from the owner of the latter, who is entitled in turn to a compulsory licence to use the later invention. Besides such mutual compulsory licences, compulsory licences of the ordinary type may be obtained after three years (Art. 21). The proceedings are taken in the Annulment Department of the Patent Office (Art. 36 [3]), subject to an appeal to the Patent Court at Vienna (Arts. 39, 41).

Belgium (Law of May 24, 1854).—Patents are granted, as in France, without previous examination at the risk and peril of the applicants, and without guarantee either of the reality, or of the novelty, or of the merit of the invention (Art. 2). The invention must be worked in Belgium within one year (unless the Government grants an extension of time not exceeding one year) from the commencement of working abroad on pain of annulment by royal decree. The patent is also liable to be annulled when the invention being worked abroad has ceased to be worked in Belgium during a year, unless the patentee justifies the cause of his inaction (Art. 23). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Bolivia (Law of May 8, 1858).—The question of novelty might apparently be enquired into under Articles 10-17, although there is no express provision on the subject in these articles. But the patent itself states that the Government does not guarantee the reality, the merit, or utility of the invention, and that these matters are at the risk of the patentee (Art. 18). The patent lapses if the patentee allows a year and a day to elapse after the date of his patent without having put the invention into complete practice, unless he excuses his omission on ustifiable grounds (Art. 38 [4]). There are no provisions for revocation or forfeiture on the ground of discontinuance of working or prohibiting importation by the patentee of patented articles. The State may buy the secret of any invention useful to industry for the general benefit (Art. 4).

Brazil (Law of October 14, 1882).—A patent may be refused if it appear that the invention does not offer practical results (cp. Art. 2, s. 2, with Art. 3, s. 2). An appeal lies from such refusal to the Council of State (Art. 3, s. 2). With the exception just noted, patents are issued without previous examination, and are expressed to be granted without guarantee of the Government as to novelty or utility (Art. 3, s. 3). The patent lapses

(i) if the patentee does not make effective use of the invention within three years counting from the date of the patent;

(ii) if the patentee suspends the effective use of the invention for more than one year, except by reason of *force majeure*, admitted by the Government after consulting the Council of State.

By "use" in (i) and (ii) is understood the effective exercise of the patented industry and the supply of the products in proportion to their employment or consumption. The Government, on proof that the supply is insufficient for these requirements, can restrict the privilege to an area fixed by a decree made with the approval of the Legislature (Art. 5, s. 2 [2]). In connection with this last point, it may be mentioned that if during the term of the privilege the free use, or exclusive use, by the State of an invention should appear to be necessary in the public interest, the patent may be expropriated (Art. 1, s. 4). The lapse of patents is declared by the Minister of Commerce, with an appeal to the Council of State (Art. 5, s. 4). There is no prohibition of the importation of patented articles by the patentee.

Chili (Laws of September 9, 1840; August 1, 1851; July 25, 1872; January 26, 1888).—There is a preliminary examination into novelty (1840, Art. 2) and utility (Law of August 1, 1851) by the General Direction of Public Works, who have power to appoint experts if necessary (1888, Art. 9). A term is fixed for the establishment of the invention, and on the expiration of that period the privilege commences to run (1840, Art. 14), or lapses if the invention has not then been established (*ib.*, Art. 15). The privilege also lapses if, after establishment, the work of the invention is abandoned for more than one year (*ib.*, Art. 15). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Colombia (No. 35, of May 13, 1869).—Patents are granted without preliminary examination as to utility or novelty, and neither of these qualities is guaranteed (Art. 7). The patent lapses whenever a whole year passes without its being worked, except in the case of fortuitous circumstances and *force majeure* (Art. 12). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Congo (Law of October 29, 1886; Decree of October 30, 1886).—There is no preliminary examination into novelty or utility (Law of October 29, 1886, Art. 2), and the patent expressly states this fact, and also that the grant is made without guarantee of novelty or utility (Decree of October 30, 1886, Art. 5). There are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee.

Costa Rica (Law of June 26, 1896).—There is no preliminary examination into novelty, and there are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee. A patent which ceases to be worked during three consecutive years becomes public property (Art. 67), and the same result follows when two years have passed, counting from the date of registration, without the invention being put into practice (Art. 66).

Denmark (Law of March 28, 1894).—There is a preliminary examination

into novelty and utility (cp. Art. 2, s. 15 with Art. 1, s. 1) by the Patent Commission. If the Commission takes an adverse view of the invention in regard to novelty or utility, it gives the applicant an opportunity of making a verbal or written explanation, and if it is clearly of its first opinion, the application is rejected (Art. 2, s. 15). Within six weeks after the Patent Commission has communicated this fact to the applicant, he may lodge a request (accompanied by a more detailed explanation) for a reconsideration of his case by the Commission, and if the result of such reconsideration is still unfavourable to his claim, he may, within four weeks after the Patent Commission has communicated its decision to him, lodge with the Minister of the Interior a demand to have the case examined by a special Commission consisting of a president and four other members, appointed by the Minister of the Interior, with special reference to the nature of the case. With this request the applicant forwards a fee of one hundred kroner, which is repaid to him if the decision of the Patent Commission is not confirmed (Art 2, s. 19). The patent lapses if it is not carried out in Denmark within three years from the date of its issue, or if its working is discontinued for more than a year. In either case, however, the time may be extended by the Patent Commission if it is shown that circumstances for which the patentee cannot be held accountable have prevented the working or caused the discontinuance. The Patent Commission may release the patentee from the obligation of manufacturing the patented articles in Denmark if

(*a*) the cost of such manufacture is shown to be out of reasonable proportion to the home consumption, and

(*b*) the patentee takes care that the patented article is always kept on sale in Denmark (Art. 3, s. 23 [4]).

There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Ecuador (Law of October 18, 1880).—This Law is practically identical with the Law of Bolivia (*q.v.*), the provisions of which, on the points under discussion, are summarised (*sup.*)

Finland (Ordinance of January 21, 1898).—There is a preliminary examination into novelty to this extent—that the Industrial Board may refuse to patent an invention which is evidently not new (c. 2, s. 7). The applicant may appeal within sixty days of the date of an adverse decision to the Economy Department of the Senate ; and if the appeal involves a technical question, the Senate may have the matter examined by experts (s. 13). If the invention has not been brought into practice in Finland to any considerable extent within three years from its date, or if the working of the invention is discontinued after that time, the holder of the patent must grant licences to other persons to use it (c. 3, s. 18, and cp. s. 4 of an Ordinance of the same date, January 21, 1898). If the invention has not been utilised to any considerable extent in Finland, but

on the other hand has been exercised abroad, the patentee must provide a home supply so far as is practicable, and at a reasonable price. If he fail to do this, the patent may be forfeited (c. 3, s. 18). A patent may be appropriated by the State for its exclusive use or the free use of the public on payment of reasonable compensation to the patentee (c. 5, s. 30, and cp. s. 3 of the Ordinance of January 21, 1898). S. 4 of the last-named Ordinance also provides for compulsory licences (*a*) under circumstances similar to those contemplated by s. 22 of our own Imperial Act, and (*b*) as under Austrian law (*v.* AUSTRIA, *sup.*), where the patent is a bar to use of an allied invention of great importance, the owner of the earlier patent being entitled in turn to a licence to use the later invention. There is no prohibition of the importation of patented articles by the patentee.

France (Law of July 5, 1844).—Articles are granted without preliminary examinations into, or guarantee of, novelty or utility, at the risk and peril of the applicant (Art. 11), and a patentee who mentions his title as patentee without adding the words "*Sans garantie du Gouvernement*" incurs liability to a fine of from fifty to a thousand francs (Art. 33). In practice, the initial letters *S.G.D.G.* are almost universally used, although it has been held that such use constitutes a violation of the law. A patent is liable to forfeiture

(*a*) if the patented invention is not worked in France within two years from the date of the signature of the patent, or if the working ceases for two consecutive years, unless in either case the patentee can show good cause for his inaction;

(*b*) if the patentee imports into France articles made abroad similar to those protected by his patent (Art. 32 [2, 3]).

But (Law of May 31, 1856) the Minister of Commerce, Agriculture, and Public Works may authorise the introduction

(i) of models of machines,

(ii) of articles made abroad intended for public exhibitions, or for trials made with the consent of the Government.

As regards (*a*), it may be observed that the French Courts are not rigorous in their requirements as to what constitutes "working." While the law insists that there shall be a real working, the working of one mode of procedure where the patent comprised several, the construction of a machine, though the machine constructed was not sold, and the granting of a licence or the obtaining of a medal at an exhibition have each been held sufficient to satisfy its provisions. So too, illness, want of capital, and change in the public taste may be sufficient to justify a patentee's inaction (see Barclay's *French Law of Patents*, p. 55, and Goirand's *French Commercial Law*, 2nd ed., p. 474). As regards (*b*), it should be noted that the prohibition of importation no longer applies to States coming within the International Union for the Protection of Industrial Property; but the patentee remains bound to "work" his patent in conformity with the laws of the country into which he introduces the patented article (Art. 5).

Germany (Law of April 7, 1891).—An invention is not considered novel if, at the date of the application for a patent, it has already been so described in printed publications of the last hundred years, or has been so publicly used within the realm, that its use by other experts appears possible (s. 2). There is a preliminary examination (see AUSTRIA, *sup.*) by a member of the Application Department of the Patent Office. If the result of the examination is adverse to the applicant on the point of novelty, the fact, with the grounds of the adverse opinion, is notified to him, and he is requested to reply within a specified time. If he fails to do this, the application is treated as withdrawn; if he complies with the request, the Application Department comes to a decision (s. 21), in which the member who gave the preliminary decision takes no part (s. 22). If the patent is still refused, the applicant can appeal within a month from the date of notification of the fact to the Appeal Department (s. 26, and cp. s. 14). A patent is liable to be revoked at the end of three years from the date of the official publication of the grant

(*a*) if the patentee has not brought the invention into practice within the realm, or at least done all in his power to ensure that result;

(*b*) if the grant of licences appears desirable in the public interest, and the patentee declines to grant them on reasonable terms (s. 11).

It seems that applications under this latter head are rare. There is no provision for forfeiture on the ground of discontinuance, and the importation of patented articles by the patentee is not prohibited.

Greece.—There is no general statute law in Greece.

Guatemala (Law of May 21, 1886; Decree of December 17, 1897).—There is a preliminary examination, *inter alia*, into the question of the advantages or disadvantages [*of the invention*], both in relation to industry and also in relation to safety and health (Decree of December 17, 1897, Art. 16). A patent lapses

(*a*) if the invention is not put into practice for a year, or

(*b*) if there is a year's discontinuance of its working (*ib.*, Art. 8).

There is no prohibition of importation of patented articles by the patentee, and no provision is made for compulsory licences.

Hawaiian Islands (Civ. Code, ss. 255, 256, Law of August 29, 1884).—There is a preliminary examination into both novelty and utility (1884, s. 6). There are no provisions as to compulsory working, forfeiture or revocation on the ground of discontinuance, compulsory licences, or prohibiting the importation of patented articles by the patentee.

Hungary (Law of July 7, 1895).—An invention is regarded as new, notwithstanding publication or working, if between its last publication or working and the application for a patent a term of one hundred years has elapsed (s. 3). Whether an official publication in a foreign State deprives an invention of novelty is a matter to be determined by treaties with foreign

States (ss. 3,16). The novelty of the invention is not officially made the subject of examination or decision (s. 33). A patent may be withdrawn or revoked as a whole or in part

(i) if the patentee neglects to work or use his invention within the countries of the Hungarian Crown, in substance and to an adequate extent, or if he has interrupted such working or use, or if he has not done all that is necessary according to his own and the country's circumstances and conditions for securing and continuing such working

(ordinarily such withdrawal or revocation cannot take place until three years after the publication of the grant of the patent, but it may take place earlier if the home supply is not met or licences are not granted) ;

(ii) if the patentee, after three years from the date of the patent, fails to work his invention adequately or to grant licences on suitable terms.

A patent granted to the State cannot be withdrawn or revoked (s. 20). There is no prohibition of the importation of patented articles by the patentee.

Italy (Law of January 31, 1864, extending Sardinian Law of October 30, 1859, to the whole Kingdom of Italy).—There is no preliminary examination into novelty. The period for compulsory working or for discontinuance, which is fatal to the validity of the patent, is one year if the patent is granted for five years or less, two years if granted for more than five years. In neither case does annulment ensue if the inaction arises from causes beyond the control of the patentee ; but want of pecuniary means is not included among these causes (Art. 58). There is no provision for compulsory licences, and the importation of patented articles by the patentee is not prohibited.

Japan (Law of July 16, 1899).—*Semble*, there is a preliminary examination into novelty. Forfeiture ensues if the patentee fails to work his invention within three years of the date of the certificate of grant, or if, having discontinued for three years, he refuses a reasonable request by a third party for an assignment or licence.

Liberia (Act of December 23, 1864).—There is a preliminary examination into novelty (s. 4). An invention patented by an alien must be brought into active operation in the Republic within three years from its date, refusal or neglect to comply with this provision being regarded as an abandonment of the invention to the public (s. 6). There are no provisions as to forfeiture or revocation on the ground of discontinuance, compulsory licences, or prohibiting the importation of patented articles by the patentee.

Luxembourg (Law of June 30, 1880).—There is no preliminary examination into novelty, and patents are granted without guarantee by the Government (Art. 12). A patent may be withdrawn after three years if

the patentee neglects to work his invention in the Grand Duchy to a suitable extent, or at least to do all that is necessary to secure its working (Art. 18). Similarly, compulsory licences may be declared after three years (*ib.*). There is no prohibition of importation of patented articles by the patentee.

Mexico (Law of June 7, 1890).—There is no preliminary examination into novelty or utility, and patents are granted without guarantee on either of these points (Art. 5). There are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee. But patents may be expropriated on terms

(i) when the patentee refuses to permit the working of his patent;

(ii) when the machine, apparatus, instrument, or process is capable of being (and, *semble*, is not) produced or applied in Mexico (Art. 15).

Mysore (Reg. No. 11 of 1894).—The provisions of this Regulation are substantially identical with those of the Patent Law of British India (*q.v.*).

Negri Sembelan (Order in Council No. 4 of 1896).—There is a preliminary examination into novelty on a reference by the British Resident (s. 6). The exclusive privilege may be determined if it is being exercised in a manner mischievous to the State and generally prejudicial to the public (s. 15), and compulsory licences may be ordered (s. 16, which is practically identical with s. 22 of the Imperial Act). There is no prohibition of the importation of patented articles by the patentee.

Nicaragua.—There is no general statutory patent law.

Norway (Law of June 16, 1885).—If the invention forming the subject of the application is evidently not new, the application may be rejected (s. 16). A patent may be judicially revoked if the invention is not worked, or the patented articles are not put on sale, in Norway within three years, or if such working or putting on sale is discontinued for a year. But this last-mentioned term may be extended by the Patent Commission if the discontinuance is proved to have been due to an accidental occurrence. In exceptional cases the Patent Commission may define the special requirements as to what will be considered sufficient working or putting on sale (s. 27). Compulsory licences may be ordered (s. 9). There is no prohibition of the importation of patented articles by the patentee.

Orange River Colony.—The law of the Orange Free State was regulated by Ordinance No. 10 of 1888. There were no preliminary examinations into novelty, no provision for compulsory working, or forfeiture or revocation on the ground of discontinuance, and no prohibition of the importation of patented articles by the patentee. Compulsory licences might be ordered (Art. 21, practically identical with s. 22 of the Imperial Act).

Perak (Order in Council No. 2 of 1896).—There is a preliminary examination into novelty on a reference by the British Resident (s. 6). There are no provisions as to compulsory working or forfeiture or revocation on the ground of discontinuance. The exclusive privilege may be determined if the manner

in which it is exercised is mischievous to the State or generally prejudicial to the public (s. 15). Compulsory licences may be ordered (s. 16, which is practically identical with s. 22 of the Imperial Act).

Peru (Laws of January 28, 1869, and January 3, 1896).—There is no express provision for a preliminary examination into novelty. But, *semble*, one might be ordered under 1869, Arts. 9 and 10, and 1896, Art. 4. But the Government does not guarantee the novelty or utility of the invention (1896, Art. 3). Forfeiture is entailed

(i) by failure to work the invention within two years or the period stipulated in the privilege;

(ii) by importation of articles manufactured in a foreign country similar to those protected by the patent, except models of machinery whose importation is authorised by the Government after investigation (1896, Art. 15).

Compulsory licences may be ordered under Art. 27 of the Constitution.

Portugal (Decree of December 15, 1894).—An invention is not considered new if it has been described in any publication within a hundred years (Art. 9). There is no preliminary examination into novelty, and patents are granted without guarantee as to their novelty or utility (Art. 12). A patent is forfeited

(*a*) if not worked within two years from its date by manufacturing the patented articles in Portugal, or

(*b*) if such working is discontinued for two consecutive years, unless the patentee can justify his inaction (Arts. 38 and 39).

The importation of patented articles by the patentee is not prohibited (Art. 38). There are no provisions as to compulsory licences.

Russia (Law of May 20, 1896).—There is a preliminary examination into novelty (but not into utility) by a Committee of the Department of Commerce (B. Art. 15, and cp. Art. 3), the applicant having a right of appeal within three months from a rejection of his application to the Department of Commerce (Art. 18), with the assistance of experts (Art. 19). The patentee must work his patent in Russia within five years from its date, and within the same period submit to the Department of Commerce a certificate of such working by a competent authority appointed by the Minister of Finance (Art. 24). There are no provisions as to the forfeiture or revocation of the patent on the ground of discontinuance, or as to compulsory licences, or prohibiting the importation of patented articles by the patentee.

Selangor (Reg V. of 1896).—The provisions are substantially identical with those summarised under PERAK (*sup.*).

South African Republic.—See TRANSVAAL (*inf.*).

Spain (Law of July 30, 1878).—There is no preliminary examination into, and no guarantee of, novelty or utility (Art. 11). A patent lapses

(*a*) if not proved before the Director of the Conservatory of Arts to have been worked in Spanish territory within two years from its

date (a term which can be prolonged for six months and not more)

(in this case the lapsing is declared by the Minister of Commerce, on the previous advice of the Director of the Conservatory of Arts, and an appeal lies to the Judicial Committee of the Council of State);

(*b*) on discontinuance of working for a year and a day, unless due to *force majeure*.

Here the lapsing must be judicially declared by the Courts on the application of an interested party (Arts. 38, 46, 47). There are no provisions as to compulsory licences, and the importation of patented articles by the patentee is not prohibited.

Sweden (Laws of May 16, 1884, and March 26, 1897).—There is a preliminary examination into novelty, and if the invention is evidently not new, the application is to be rejected (1884, s. 6), the applicant having a right of appeal to the King "before twelve o'clock on the sixtieth day after the date of the decision" (*ib.*, s. 8). The patent must be worked within Sweden to an adequate extent within three years (which may be prolonged by the patent authorities to four years) from its date. The patent authorities may, in exceptional cases, determine what measures taken by the patentee will constitute a sufficient working (s. 15). Discontinuance of working for a year forfeits the patent (*ib.*) Importation of patented articles by the patentee is not prohibited. The patented invention may be appropriated for the use of the public or of the State on terms, the compensation, if it cannot be agreed upon, being fixed by a special jury appointed by the Court according to the law governing the seizure of land or homesteads for public purposes (s. 17).

Switzerland (Laws of June 29, 1888, and March 23, 1893).—There is a preliminary examination into novelty (1888, Art. 17), but no guarantee of novelty (*ib.*, Art. 18). The patent is forfeited

(*a*) if the invention is not in any way carried out in practice at the expiration of the third year from the date of the patent;

(*b*) if the patentee imports the patented articles while refusing application on equitable terms for Swiss licences. The forfeiture is in each case declared by the tribunal having jurisdiction in infringement cases on the application of a party proving that he is interested (Art. 30).

Mutual compulsory licences may be ordered as in AUSTRIA (*sup.*, and see Art. 12). There is no provision as to forfeiture on the ground of discontinuance.

Transvaal.—The law was regulated by No. 10 of 1899. There was no preliminary examination into novelty, and no provision was made for compulsory working, or forfeiture on the ground of discontinuance, or the prohibition of the importation of patented articles by the patentee. But compulsory licences might be ordered (Art. 27, which was practically identical with s. 22 of the Imperial Act).

Tunis (Law of December 26, 1888).—There is no preliminary examination into novelty, and (Art. 9) patents are granted at the risk of the applicant, and without guarantee of novelty or utility. Forfeiture ensues on

(*a*) failure by the patentee to work his invention in Tunis within two years, or discontinuance of such working for two consecutive years, unless in either case the inaction is justified;

(*b*) importation of patented articles by the patentee;

but, as in France, the introduction may be authorised

(i) of models of machines,

(ii) of articles made abroad for public exhibitions, or for trials made with the consent of the Government (Art. 26).

There is no provision for compulsory licences.

Turkey (Law of March 2, 1880).—There is no preliminary examination into, or guarantee of, novelty or utility (Art. 11), and if a patentee mentions his title as such without adding the words "Without guarantee of the Government," he incurs a liability to a fine of from two to forty-five Turkish pounds (Art. 39). The provisions (Art. 38) as to compulsory working, forfeiture for discontinuance, and prohibiting importation are substantially identical with those stated *sup.* under FRANCE and TUNIS. There is no provision as to compulsory licences.

United States (Revised Statutes, Tit. xi., Act of March 3, 1897).—There is a preliminary examination into novelty (Rev. Stats., ss. 4893, 4903), the applicant having a right of appeal from the decision

(i) of the primary Examiner to the Examiners in Chief (s. 4909);

(ii) from the Examiners in Chief to the Commissioner in person (s. 4910);

(iii) from the Commissioner to the Supreme Court of the District of Columbia sitting in Court (s. 4911-13).

If the patent is refused by either the Commissioner or, on appeal from him, by the Supreme Court of the District of Columbia, the applicant has still a remedy by a bill in equity (s. 4915) to the Circuit Court (s. 629 [9]). There are no provisions as to compulsory working, forfeiture on the ground of discontinuance, importation of patented articles by the patentee, or compulsory licences.

Uruguay (Law of November 12, 1885).—There is no preliminary examination into, or guarantee of, novelty (Art. 6). The period for compulsory working is fixed by the Executive (Art. 11), and may be extended by the Legislature in cases of delay caused by *force majeure* (Art. 13). Forfeiture ensues on failure to work the invention within the prescribed period, or (except in case of *force majeure*) on discontinuance of such working for a year (Art. 36). Importation of patented articles by the patentee is not prohibited. A grant in the nature of compulsory licence may be ordered, as against strangers obtaining certificates of addition, in favour of the first inventor, who may elect, however, to take a premium instead (Arts. 29 and 30).

Venezuela (Law of May 25, 1882).—There is no preliminary examination into, and no guarantee of, utility or novelty (Arts. 3 and 11). The patent lapses if not put into practice within a period fixed by the grant (Arts. 8, 23 [1]), or if the working is discontinued for more than a year (Art. 23, [2], and see further Art. 18). Importation of patented articles by the patentee is not prohibited, and there is no provision for compulsory licences.

IV.—CONCLUDING OBSERVATIONS.

The following points appear to be worthy of notice in connection with the foregoing summary :—

(i) A preliminary examination into novelty or utility never involves *any guarantee* on the part of the State that a patent is novel or useful as against third parties. In many cases (see *e.g.*, *sup.*, ALGERIA, BELGIUM, BOLIVIA, BRAZIL, FRANCE, RUSSIA, SWITZERLAND) such a guarantee is expressly disclaimed.

(ii) In some cases, in spite of a disclaimer of any guarantee, there is, or may be, a preliminary examination as to novelty (see *sup.*, BRAZIL, BOLIVIA).

(iii) In some cases there are general clauses under which a preliminary examination into novelty might be held (see *sup.*, BOLIVIA, PERU).

(iv) In certain countries (*e.g.*, FRANCE, TURKEY, TUNIS, *sup.*) a patentee, if he mentions his title as such, must add to it the words "*Sans garantie du Gouvernement*" or their equivalents.

(v) In certain patent laws, applications for patents for obviously old inventions may be rejected (see *sup.*, NORWAY) and in others there are "unexplored remainders" under which such applications might be rejected.

(vi) In most cases the State has power to "expropriate" a patent for its own use (a few typical instances of this power have been deemed sufficient), and in many cases (see, *e.g.*, SWEDEN, *sup.*) a similar power exists of expropriation for the free use of the public.

(vii) Compulsory licences on the lines of s. 22 of the Imperial Act are very common in the colonies (see, *e.g.*, *sup.*, CEYLON, HONG-KONG, MALTA), and are to be found also, with modifications, in foreign countries (see, *e.g.*, *sup.*, ARGENTINE REPUBLIC, FINLAND). Provision is also made for mutual compulsory licences (meeting Clause (c) of s. 22 of the Imperial Act; *vide ante*, p. 294) in some cases (see *sup.*, AUSTRIA, FINLAND).

(viii) Compulsory working is prescribed in most Continental countries and in some of the colonies (see *sup.*, AUSTRIA, BELGIUM, CANADA, FRANCE). It is usually linked with a prohibition for discontinuance of working for more than a specified period. The modern tendency is to interpret these provisions liberally (see *sup.*,

France), and any severely literal construction of them would probably lead to retaliatory measures.

(ix) The importation of patented articles by the patentee is prohibited sometimes (as in France, Tunis, Turkey, *sup.*) absolutely (with the exception of models, etc.) under pain of forfeiture, sometimes (see Switzerland, *sup*) where the patentee fails to grant home licences on reasonable terms.

(x) In certain cases, "ancient anticipations" are limited. Thus in Hungary (*q.v.*) an invention is regarded as new, notwithstanding publication or working, if between the last publication or working and the application for a patent a term of one hundred years has elapsed (see also Portugal, *sup.*). A Bill introduced into the English Parliament in 1895 by the present Master of the Rolls (Lord Alverstone), Mr. Fletcher Moulton, Q.C., M.P., and Mr. R. B. Haldane, Q.C., M.P., proposed a limit of fifty years.

NOBILITY IN ENGLAND.

[*Contributed by* EDWARD MANSON, ESQ.]

Types of Nobility.—Nearly all nations present us, in some stage of their development, with the spectacle of a privileged class enjoying a monopoly of wealth, of honours, and of political power. The origins of such a privileged class or caste are various. The class may owe its pre-eminence, as in the case of the patricians in early Rome, to the growth by its side of a new people—the plebs—unadmitted to privileges, or, as in the case of the later "nobiles," to their ancestors having filled important offices of State—the *jus imaginum*. It may be a nobility of conquest, as in Sparta, or of wealth and office growing out of wealth, as in the seigniory of Venice. It may be formed from a religious or priestly caste, as with the Brahmans of India. Among the Germans, nobility seems to have been derived from the ennobling quality of the land—a fact clearly recognised by the Anglo-Saxons in the institution of wergild.

The Nobility of Arms.—The effect of the feudal system in mediæval Europe was to introduce a nobility constituted on the basis of military service. Among those martial races which founded their kingdoms on the ruins of the Roman Empire, arms were esteemed the only proper title to honour. "In all examples of our Charters of ennobling," says Selden (*Titles of Honour*), "arms are given as a perpetual and necessary concurrence with gentry."[1] And this right to wear coat armour bestowed by the sovereign as the fountain of honour became accordingly the distinguishing badge of nobility, raising the gentleman to an eminency above the multitude—an eminency perpetually inherent in his person. In the letters of nobility were blazoned the arms which were to distinguish his shield; and by this shield he was to be known as "nobilis." A plebeian had no blazonry on his shield because he was "ignobilis," or unworthy of notice. The quarterings on a coat of arms showed with how many noble families the possessor was

[1] Thus in the letters of nobility granted by Henry VI. to Nicholas Cloos, the architect of King's College, Cambridge, and to Roger Keys, the architect of Eton College, the grant runs, "Nobilitamus nobilemque facimus et creamus," and goes on, "in signum hujus nobilitatis arma et armorum signa damus et concedimus." Lady Juliana Berners tells us in the Boke of St. Albans (1486) that "the iiij doctores of holi Church Seynt Jerom Ambrose Augustyn and Gregori war gentilmen of blode and of cot armures": so ingrained was the association of ideas.

allied, how many strains of gentle blood ran in his veins. They corresponded closely to the long line of "imagines" to which the Roman noble pointed as the proof of his nobility. This nobility of arms created on the Continent a caste which boasted ennobled blood and the political privileges (immunity from taxation among them) which flowed from it, and held itself aloof in haughty isolation from the rest of the nation. No such caste with a divine ichor running in its veins has ever formed itself among us, and the fact is one of capital significance in our social and constitutional history. Not that good blood has not been recognised and respected in England from the earliest times to the latest: we still hold with Horace, "Fortes creantur fortibus et bonis"; but the belief in blood has never produced, happily for us, any deep division of classes—the social cleavage of the Continent. Why is this? Why is it that the ennoblement of blood never took the shape in England which it did in mediæval France or Germany?[1]

The Peerage.—The deepest cause lies in that national character which is national destiny—the free, independent spirit and democratic temper of our race,—in this first, and next to it in the growth of an hereditary peerage, eclipsing by its superior splendour the lustre of the untitled gentry. It may seem at first sight as if the effect of this has been to create a noblesse very much the same as that of the Continent, substituting only a smaller class of titled nobility for the larger aristocracy of gentlemen by coat armour; and in a sense this is true, but it is by no means an adequate account of the matter. It does not give sufficient prominence to the fact that this class of gentlemen by coat armour—of untitled nobility—remained the most important element of the community, and carried with it into the ranks of the commoners of the kingdom all that is expressed in the idea of blood, and the qualities and virtues which it connotes;[2] nor does it mark the fact that the dignity of peerage is one of *hereditary office*, not of blood. The true idea of nobility is that when once acquired it shall go on for ever to all descendants, or at least to all the descendants in the male line of the person first ennobled. "It is impossible," as Dr. Stubbs says, "to regard blood as ennobled by law when the nobility of the blood is restricted to the bearer of the title and does not extend even to his own children." And this is the case with the peer. All the younger sons of peers are commoners. The eldest son, so long as his father lives, is only a commoner, though he is given by courtesy his father's second title.

[1] Thackeray could still in 1847 make merry over "those snug, unassuming, dear old operas in the German towns, where the noblesse sits and cries and knits stockings on the one side over against the bourgeoisie on the other."

[2] Blood, as used in popular language, sums up and typifies those bodily and mental qualities which the child inherits from its parents. Blood may be bastardised if not transmitted through lawful wedlock—"church marked," as Mr. O. Pike terms it. It may be, or it might be, corrupted by attainder of treason or felony, whereby every inheritable quality, "upwards and downwards," was blotted out; but these doctrines of corruption and bastardy had no special application to noble blood.

Even the heir-apparent to the Crown, the Prince of Wales, would be only a commoner but for the accident that he is born Duke of Cornwall (*dux natus, non creatus*).

Its Historical Origin.—This characteristic of hereditary office in the peer comes out more clearly if we glance at the historical origin of the peerage. Tacitus saw the Germanic chieftain (*princeps*) surrounded with brave and approved retainers—*in pace decus, in bello præsidium*—and gave to these retainers (*proceres*) the same name as that used to designate the retinue of the Roman Emperor (*comites*). In this body of *comites*, or rather in their mediæval equivalents, we have the beginnings of our English peerage, the feudal counts or earls and barons. When William the Conqueror made himself master of England these were the men, bound to him by ties of personal service, among whom he distributed his great fiefs (*feuda nobilia*), late the estates of the Saxon earls and thanes. These it was who became his "men" in the feudal sense, or barons—these whom, as tenants-in-chief of the Crown, he summoned to his Parliament at Westminster[1] to aid him with their counsel, or to meet him with a retinue of armed vassals (*armis et equis*) for some military enterprise. In the centuries succeeding the Conquest, the counsellors thus summoned were a large and fluctuating body; for upon feudal theory all the king's tenants-in-chief were members of his Council. There were the temporal barons (summoned originally in virtue of their baronies), the prelates, the archbishops, bishops, abbots, and priors, often the justices of both Benches, the barons of the Exchequer and *clerici de consilio*, besides sundry others, who, as Dugdale says, "for their prudence, military valour, and loyalty were esteemed worthy counsellors." These in themselves were numerous, and their numbers were largely and inconveniently increased by forfeitures and escheats, and especially by the operation of that masterpiece of statecraft, the Statute *Quia Emptores*. Accordingly it became customary in practice to send special summonses (*propriis nominibus*) to the greater tenants only, the minor tenants receiving through the sheriff a general summons merely to the Council and the host.

The Peer an Hereditary Counsellor.—It was these greater tenants (*majores barones*) who came to constitute the peerage of the thirteenth century; and they derived their title of "pares," or peers, from the fact that they were, by virtue of the special writ of summons addressed to them, placed on an equality *inter se*, the only distinction among them being one of precedence. The choice of those to receive a special writ of summons rested with the Crown, subject only to any rule of hereditary right; and thus the true and only test of peerage, prior to the creation of peers by letters patent,[2] came to be the title to receive, as of right accustomed,

[1] *Report on the Dignity of a Peer of the Realm*, i. 85.

[2] The first temporal baron created by letters patent was John de Beauchamp, Steward of the Household to Richard II.

a special summons *nominatim* from the king to the National Council. The peer is simply an hereditary counsellor of the Crown, and it is in this capacity—not as a baron by tenure, not as a noble by blood, not as the bearer of a title of honour—but as a counsellor of the Crown that he takes his seat in the House of Lords. This appears plainly from the terms of the writ. Take as a typical instance the special writ of summons issued by Edward I., in the twenty-third year of his reign, to the Earl of Lancaster. It runs as follows:

Form of the Writ.—"Rex dilecto et fideli suo Edmundo Fratri suo Comiti Lancastrico salutem. Quia super quibusdam arduis negotiis nos et Regnum nostrum ac vos cæterosque Proceres et magnates de eodem Regno quæ sine vestra et eorum præsentia nolumus experiri Parliamentum Nostrum tenere et vobiscum super hiis colloquium habere volumus et tractatum vobis mandamus in fide et dilectione quibus nobis tenemini firmiter injungentes quatenus sitis ad nos apud Westm. primo die Mensis Augusti proximo futuro vel saltem infra tertiam diem subsequentem ad ultimum nobiscum super dictis negotiis tractaturi et vestrum Consilium impensuri et hoc nullo modo omittatis. Teste meipso apud Album Monasterium xxiii die Junii Anno Regni nostri xxiii."[1]

Here we have the official origin and true function of the peer; and it was to facilitate this proper function that the number of those summoned was limited to the most powerful and influential of the barons. A large mixed and tumultuary assemblage was not any more conducive to the transaction of business in the feudal period than it is to-day. Other circumstances combined to reduce still further the number of those summoned. Thus on the occasion when the above-cited writ was issued (23 Ed. I.) sixty-three other earls and barons, as well as the Earl of Lancaster, were summoned, besides archbishops, bishops, abbots, and priors. In the first year of Henry IV., at the beginning of the Wars of the Roses, the peers summoned to Parliament were forty-nine. In the first year of Henry VII., after the close of the Wars of the Roses, so thinned were the ranks of the barons by battle and attainder that only twenty-eight or twenty-nine were summoned to the National Council. The reduction in numbers brought about in these ways had an indirect effect of no little importance: it helped to enhance the dignity of the peerage, to accentuate its pre-eminence.

Increasing Splendour of the Peerage.—Another cause tending to the same result was the creation of new orders of precedence among the peers, distinguished by corresponding titles of honour, or, in the language of the law, dignities. Duke was introduced as a new order in the eleventh year of Edward III., taking precedence of the older dignities of earl and baron—a precedence yielded to it owing, seemingly, to the circumstance that the first dukes were of royal blood—the Duke of Cornwall, the Duke of Lancaster, the Duke of York, and the Duke of Gloucester. It is plain, at all

[1] Dugdale, "Summons to Parliament," 8.

events, that the peers were by this time jealous of their position and privileges; for when Richard II. created Robert de Vere Marquis of Dublin, though only for life, and assigned him his seat in Parliament below the dukes and above the earls, the earls highly resented the novel dignity ("*nova dignitas Anglicis insueta*" Selden,[1]): and in deference to the same strong feeling on the subject, the Earl of Dorset, who in the same reign had had the dignity of marquis conferred on him by the king, declined the title. It was not till the reign of Edward VI. that the title of marquis established itself. The dignity of viscount, ranking between that of earl and baron, was introduced by Henry VI., the recipient of the honour being John Lord Beaumont.[2]

Eclipse of the Untitled Nobility.—The creation of these various illustrious orders in the peerage, the hereditary nature of the dignities, the cumulative titles and honours borne by many of the peers, the appellation "my lord," and other deferential styles of address, the courtesy titles given to the children of peers, the splendid robes, coronets, and other insignia with which the orders of the peerage are invested,—all these have contributed to enhance the dignity of the peer, while obscuring his true character of hereditary counsellor, and to cast a glamour round those families whose heads are entitled to a seat in the gilded chamber, to the disparagement of the untitled gentry. "The hereditary dignity of the peer," as Professor Freeman says, "the great political position which it carries with it, stands so immeasurably above any hereditary dignity which attaches to the simple gentleman by coat armour, that the gentleman by coat armour—the noble of other lands—has ceased in England to be looked on as noble at all." Countless families which would be reckoned as noble anywhere else are not reckoned as noble in England. They may be rich and ancient, they may claim an illustrious pedigree, and may be able to prove their claim, yet, not being peers, they are gentle only, not noble, in our English use of the term.

Its Beneficial Results.—But note the inestimable benefits which have accrued to the nation at large from the working of this—from the exaltation of the peerage at the expense of the true nobility of the realm—the gentlemen by coat armour. It levelled the barrier of pride and exclusiveness which in other countries hedged in the nobility. It brought over the gentlemen by coat armour—the knights of the shire—to the side of the people, and welded them into one. It high-mettled the blood of the great English middle class; it gave them leaders and ideals. In the reign of Edward II. the temporal peers may be reckoned at fifty. In the same reign the number of gentlemen entitled to wear coat armour is computed by a writer on heraldry at nine hundred and forty-eight. For every peer who took his seat with the Lords there were thus nearly twenty gentlemen by coat armour

[1] *Titles of Honour*, p. 628.

[2] It is worthy of observation that duke, marquis, earl or count, and viscount were all originally titles of *office*.

whose valour, wealth, and ancient lineage went to ennoble the ranks of the Commons of England, and to strengthen their cause.

The Knight in Chaucer.—The gentleman by coat armour, the knight of the shire, might bear no dazzling titles, but he was, even in England, a personage of high distinction and territorial influence—the peer of the Continental noble. He embodied, besides, an ideal of chivalrous manners and knightly honour, which was a perpetual pattern to his social inferiors. We may see this in the "verra perfect gentil knyghte" of Chaucer's *Canterbury Tales*:

> "That fro the tyme that he first began
> To ryden out, he loved chivalrye,
> Trouthe and honour, fredom and curteisye."

But perhaps the most striking feature in Chaucer's picture is the frank, social relations existing between the gentry of Edward III.'s time and the other orders of the people—the salutary intermingling of classes. Mine hoste and all the pilgrims treat the knight with the greatest respect, not only for his rank, but for his worthiness; yet this rank and social dignity do not prevent the knight mixing freely with the pilgrims of all degrees and telling his story like the rest of them—a story, by the way, of chivalry and noble deeds. He, just as the squire of our own day, was in close touch with his tenantry and neighbours of all degrees—much more so than the feudal baron; and it was this warm, wholesome contact with his fellow-men of every class which, concurring with the overshadowing pre-eminence of the peerage, made possible in England what would not have been possible on the Continent, the alliance of the gentlemen by coat armour with the Commons, the noblesse with the bourgeoisie.

Freedom in Marriage.—The same absence of caste feeling appears in the matter of marriage, in which more than in anything else in nobility-ridden countries "birth's invidious bar" is wont to operate. It was thought no disparagement in England for one even of royal blood "to intermarry with a commoner. Thus when Joanna of Acre, the daughter of Edward I., was contracting a marriage with a plain knight, Ralph of Montherner, of obscure extraction, one of the great barons who was present declared aloud, in the hearing of the princess's royal father, that a marriage of such a kind was not consonant with his dignity, seeing that noblemen, counts, and barons were ready to espouse her: to which she answered, that there was no disgrace or dishonour in a great and powerful earl allying himself in marriage with a woman of no substance or state, and so neither was it blameworthy, nor was there any impediment to her marrying a vigorous young man (*strenuum juvenem*). The daughter of Thomas Mowbray, Duke of Norfolk, married Sir John Howard; and the Countess of Salisbury, the daughter of George, Duke of Clarence, married Sir Richard Cole. The great social gulf in early England was not that between the baron and knight and the Commons,

but between the free and the unfree, the eorl and ceorl of Saxon times.[1] "Our law," as Sir F. Pollock and Professor Maitland remark (*Hist. English Law*, i. 391), "hardly knows anything of a noble or of a gentle class. All free men are in the main equal before the law."

The Separation of the Houses in Parliament.—Politically the decisive moment was when the elements of Parliament settled themselves in the separation of the two Houses in Edward III.'s reign. In 1352 the Chapter House of Westminster Abbey became the chamber of the Commons; and the county members—the knights of the shire—took their seats side by side with the burgesses of the towns, a thing which would have been impossible in any other country in Europe, where gentlemen by coat armour ranked as nobles, and despised townsmen far too much to sit in the same House with them. Thenceforward they (the knights of the shire) were identified with the struggles and fortunes of the people, giving to the House of Commons a dignity, weight, and stability without which it would have been wholly incapable in a feudal England of defending the liberties of the people against king and barons.

"C'est la," remarks M. Guizot, "le grand fait qui a décidé la destinée politique de l'Angleterre. A eux seuls les députés des bourgs n'auraient jamais eu assez d'importance, assez de force, pour former une Chambre des Communes capable de resister tantôt au roi, tantôt aux hauts barons, et de conquérir sur les affaires publiques, une influence toujours croissante. Mais l'aristocratie ou plutôt la nation féodale s'etant coupée en deux, et la nation nouvelle qui se formait dans les villes s'etant fondue avec les franc-tenanciers des comptés, de la sortit une Chambre des Communes imposante et nécessaire. Il y eut un grand corps de nation independant et du roi et des grands seigneurs" (*Hist. des Origines du Gouvern. Rep.* ii. 276).

National Character.—It has been called a happy accident, this fusion of knights of the shire and burgesses in one assembly; but it is not happy accidents that determine the career of a nation. The fusion was the outcome in the main of national character working out its destiny; but among causes co-operant to the issue, one of the most potent was certainly the constitution of the peerage. Paradoxical as it may seem, it is the peerage which has saved us, in Professor Freeman's words, from "the curse of an hereditary nobility" of the Continental type, and which has consolidated the English people into one "noble and puissant nation."

[1] There is an old ballad—*Glasgerion*—which illustrates the sentiment. Glasgerion was a minstrel, though a lord's own son, and he harped so well before the king that he won the love of the young princess, his daughter. She tells him to come to her bower at night. The minstrel's page overhears the assignation, dresses himself in his master's clothes, and goes to the lady's bower, personating the lover. Later comes Glasgerion himself; the deception is discovered with tragic consequences, and the princess stabs herself, exclaiming passionately:

"A churle's blood shall ne'er defile
The daughter of a king."

THE SEIZURE OF THE *MASHONA*.

JUDGMENT OF THE PRIZE COURT.

THROUGH the courtesy of the Colonial Office we are enabled to give the following report of the judgment of the Prize Court in the case of the *Mashona*, which was seized by an English cruiser at Port Elizabeth during the war in South Africa. No complete report of the case, so far as we are aware, has appeared in this country; and a further reason for publishing the report is the fact that the *Mashona* is one of the few recent cases in which trading with the enemy and continuous voyages are discussed in English Courts.

THE QUEEN *v.* BUCKNALL BROS. AND OTHERS.

JUDGMENT was given in this case in the Prize Court.

The *Attorney-General* and *Mr. Searle*, Q.C., appeared for the captors; *Mr. Innes*, Q.C., and *Sir Henry Juta*, Q.C., were for the defendants.

DE VILLIERS, C.J.:

This is a suit for the condemnation of the British ship *Mashona* and a portion of her cargo as prize by reason of her having been engaged, at the time of her capture, in trading with the Queen's enemies. The cargo in question was shipped at New York for conveyance to Delagoa Bay, and was consigned to various persons resident in the South African Republic, with which State Great Britain was at war at the time of such shipment. There is no question of contraband or of the rights of neutrals, the simple question being whether, at the time of her capture at Port Elizabeth, the *Mashona*, which is admitted to be a British ship, was engaged in carrying cargo for, and trading with, the Queen's enemies.

The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective Governments. "There can be no doubt," says Bynkershoek (*Qu. Jur. Pub.*, lib. 1, No. 3), "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such commerce, as is often the case, commerce is forbidden by the mere operation of the law of war." The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity, he is treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and

as an enemy of those with whom that Power is at war. In the present case the bills of lading show that several of the consignments were made to persons or companies domiciled or carrying on business in the Republic. For instance, on the margin of the bill of lading relating to twenty bales of duck for Messrs. A. Johnston & Co. there appears the word "Pretoria" over a diamond, within which are the initials "A. J. & Co., P." Another bill of lading shows a consignment of one thousand cases of lubricating oil direct to the Netherlands South African Railway Company. No claim has been made on behalf of that company, but the Netherlands consul has informed the Court that the company is domiciled in the Netherlands. Seeing, however, that it owns a railway in the Transvaal, and there carries on its main business as a railway company, it would be difficult to exclude lubricating oil, apparently intended for the use of its railways, from the operation of the rule already referred to. There appears to be some arrangement between the Governments of Great Britain and the Netherlands for the delivery to the British consul at Delagoa Bay of goods consigned to the company, and the Court will postpone judgment as to the liability of the consignment to confiscation to a future date.

There is a consignment of three hundred bags of flour to Pearson Goddard, and on the margin of the bill of lading is the word "Barberton" underneath a diamond inclosing the initials "G. G. D. B."

There are consignments of flour to the Castle Mail Packets Company, or their assigns, but in the margin are the words, "Notify A. May & Co., Johannesburg."

Moreover, across the face of the bills of lading relating to these consignments appears the following agreement in writing:

"As any cargo which may be deemed to be destined for the Transvaal and (or) Orange Free State is liable to be detained, intercepted, confiscated, and (or) otherwise restrained in the ports of Cape Colony or Natal, it is agreed by the shipper, in accepting this bill of lading, that the steamer, her owners, charterers, and (or) agents are released from all responsibility in respect of goods so detained, intercepted, confiscated, and (or) otherwise restrained."

A similar agreement appears on a bill of lading for flour consigned to the Castle Company, on the margin of which are the words, "Nantisco, care of Edward Everitt, Pretoria. Notify Mr. Leibman & Co."

There is also a consignment of five hundred and thirteen bags of meal to Bernard Elsasser by a bill of lading, on the margin of which is the word "Barberton," underneath a square inclosing the initials "B. E."

A claim has been made by Julius Leibman to the cargo consigned to M. Leibman & Co., on the ground that he had left the Transvaal towards the end of October, 1899. He says that he left with a view partly of escaping police duty, and partly for the purpose of stopping a shipment of flour which was arriving for the firm by the *Marie*, and that he was not aware of a shipment being on board the *Mashona* until informed of the fact after the commencement of the present proceeding. He does not state, however, that his firm is no longer carrying on business in the Transvaal, or that his partner, Moritz Leibman, has left that country. The goods were seized while on the way to Pretoria viâ Delagoa Bay, and no attempt was made to divert them from their course before the capture.

The same remark applies to the goods consigned to Bernard Elsasser, which are claimed on his behalf by his agent, Charles Day. Elsasser himself has made no affidavit, and is described by Day as a merchant of Barberton. It does not appear that he left the Transvaal after the outbreak of hostilities, or that he has ceased to carry on business in that country. His agent, Day, however, states

that he (Day) did all in his power, when the war became imminent, to stop shipments under order for his principal, but that his cabled and written instructions were too late. He further states that his instructions on leaving the Transvaal were to stop and dispose of all goods arriving at the coast; that certain goods consigned by other vessels had been so stopped and disposed of at Port Elizabeth, and that before the seizure his intention was to adopt the same course with regard to the goods shipped in the *Mashona*. The fact, however, remains that when the goods were seized they were the property of, and on the way to, a merchant carrying on his business in the enemy's country. Clearly, therefore, the goods consigned to M. Liebman & Co. and to Elsasser are liable to confiscation.

No claim has been made to the goods consigned to A. Johnston & Co., Pretoria: as, on the face of the bills of lading, the goods were consigned to that firm, they were liable to confiscation. There is an unimportant item of one case of catalogues consigned to the United Engineering Works, Johannesburg, which must also be confiscated. As to the consignments to Pearson Goddard and to the Castle Company for A. May & Co., it would appear that the consignees left the Transvaal within a reasonable time after the outbreak of hostilities, and the *Attorney-General* has accordingly withdrawn the claim for the confiscation of these and several other consignments in a similar position. The only goods, therefore, which the Court will, for the present, condemn as lawful prize are those consigned to A. Johnston & Co., M. Leibman & Co., B. Elsasser, and the United Engineering Works. The remainder of the cargo not claimed—*viz.* the items numbered—will not be condemned until a year and a day shall have lapsed from the return of the *Monitor*, with the exception of the lubricating oil for the Netherlands Railway Company, as to which the Court will give final judgment at a future date unless in the meanwhile a definite arrangement is arrived at between the Governments of Great Britain and the Netherlands. It has been strongly urged upon the Court that the goods are not liable to condemnation on the ground that they were consigned to a neutral port.

In the case of the *Jonge Pieter*, however, it was held by Lord Stowell that the interposition of a prior port makes no difference. "All trade," said the learned judge, "with the enemy is illegal; and the circumstance that the goods are first to go to a neutral port will not make it lawful." Moreover, it should be remembered that the goods are claimed as lawful prize on the simple ground that they were taken afloat and belonged to the enemy. As remarked by Halleck (2 International Law 129), "Goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to and become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, and subject to capture and confiscation." The question still remains whether the ship should also be condemned as lawful prize. An opportunity was given to the owners and charterers after the first hearing to give further proof that they had no intention of trading with the enemy except with the permission of the Crown. On November 20 Mr. Clunie, the travelling agent of the Bucknall Line, wrote to the Military Director of Railways in Cape Town, informing him that in future and so long as the war might last a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers would be sent for his inspection, as the Company were desirous of affording any information that might be in the interest of the Imperial Government. Mr. Herbert, the local agent at Cape Town of the owners, in his affidavit says:

"After the arrival of the steamship *Johannesburg* on October 24, 1899, I was verbally informed by the Collector of Customs (in Cape Town) that in order to obtain the necessary clearance for the vessel it was imperative that a bond of

£10,000, that the owners would land the cargo for Delagoa Bay at either Port Elizabeth, East London, or Natal, as directed by the Customs, should be entered into in favour of the Customs . . . and I was further informed that this course would have to be followed with all following steamers carrying cargo for Delagoa Bay or any cargo that might be consigned either to Port Elizabeth, East London, or Durban destined for the Transvaal or Orange Free State. Upon enquiry I was likewise informed by the Collector of Customs that he was acting upon instructions received from his Excellency the High Commissioner, through whom these orders had been communicated by the Secretary of State."

It is clear from his affidavit that had the *Mashona* made Cape Town her first port of call the same course would have been adopted as with the *Johannesburg* and other ships belonging to the company. It appears, further, from the affidavit of Ernest Martin, the agent for the charterers at Port Elizabeth, that the Sub-Collector of Customs there had received instructions from the Collector of Customs in Cape Town to pursue a similar course at Port Elizabeth. I am satisfied from his affidavit and that of the master that neither he nor the owners nor the charterers of the ship had any intention of trading with the enemy, but that on the contrary it was their desire to assist the British Government in preventing any such illegal trade, and that before the seizure of the ship it was the intention of the charterers to execute a bond undertaking not to land any goods at Delagoa Bay without the permission of the High Commissioner as representing Her Majesty.

There is no denial of the statement made on oath on behalf of the owners and charterers, and the Court may therefore take it as established that in his previous dealings with cargo consigned to Delagoa Bay the Collector of Customs had acted with the sanction of the High Commissioner.

In regard to a portion of the cargo by the *Zulu*, it appears that she was allowed by the High Commissioner to carry it to Delagoa Bay, although on the urgent advice of the agent of the charterers the commander of Her Majesty's ship *Barrosa* was subsequently induced to order the landing of the goods at East London. Can it be held under these circumstances that there was any intention to trade with the enemy? The counsel for the captors strongly relied on the case of *De Hoop*, which was certainly one of great hardship. The cargo in that case had been conveyed in a British ship from Rotterdam bound for a British port during war between Great Britain and Holland. The ship was captured for having been engaged in illegal trading. Condemnation of the cargo was resisted on the ground that the claimants, who had been previously engaged in an extensive trade with Holland, had before the war obtained special Orders in Council permitting them to continue their trade. They were subsequently informed by the Commissioners of Customs of Glasgow, under the opinion of the law advisers of the latter, that no further Orders in Council were necessary, and that all goods brought from the United Provinces could in future be entered without any such permit. The claimants consequently caused the goods in question to be shipped at Rotterdam for their account. Under these circumstances it was urged that the case was entitled to great indulgence, but Lord Stowell rejected the claim for restitution.

"There may," said that eminent judge, "be occasions on which intercourse with the enemy may be highly expedient; but it is not for individuals to determine the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle

ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State."

He added that in order to take the case out of the rule there must be legal distinctions, and not mere considerations of indulgence and compassion such as had been put forward in that case.

Such a legal distinction was made by the same judge in the subsequent case of the *Minna*, where he appears to have decided in favour of a ship captured on a voyage from Bordeaux, destined ultimately for Bremen (a hostile port), but with orders to touch at a British port, whence she was to resume her voyage, if permitted (Edwards, p. 55).

In the still later case of the *Mercurius* the same judge ordered the restitution of the ship on the ground that, although the voyage was from an enemy to a neutral port, it was the intention of the party to come to a British port in order to obtain a licence.

"I cannot," said Lord Stowell, "under any view of the case, bring myself to regard the voyage as a fraudulent, continuous voyage: there was no act either done or to be done to found the imputation of fraud; on the contrary, there is sufficient proof of an honest intention to come to this country to procure the licence and to act conformably to it when granted."

In the same manner there appears to me sufficient proof in the present case of an honest intention to pass a bond undertaking not to take the goods to Delagoa Bay except with the permission of the proper authorities. There was no concealment on the part of the charterers or the owners or the master; on the contrary, they all acted with the utmost *bona fides*, and with the sincere desire to give the authorities all the information and assistance in their power.

It is quite true that the Collector of Customs cannot, under ordinary circumstances, be regarded as in any way representing the Crown, but, as I have already remarked, it is not denied that he represented himself as acting under instructions from the High Commissioner. It can hardly be supposed that he would have taken upon himself the responsibility of requiring the previous bonds unless he had definite instructions to that effect. Having given the previous bonds, the agents of the ship honestly believed that a similar bond would be required and given in the case of the *Mashona*.

The presumption of an intention of trading with the enemy arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for restitution of the ship must consequently be allowed.

MR. JUSTICE BUCHANAN:

This being the first occasion on which the Supreme Court has been required to act as a Prize Court, it is satisfactory to find there is no difference of opinion as to the leading principles and rules of law which should govern our decision. But in the view I take of the special circumstances of the case, I think it necessary, even at the risk of repetition, to state the deductions which, in my opinion, should be drawn from the affidavits.

The two issues raised in these proceedings are:

(1) Whether or not the steamer *Mashona* is liable to confiscation as a prize, on the ground of its being a British ship which was engaged without licence in trading with the enemy; and

(2) Whether or not a certain portion of the cargo on board the ship is liable to capture, as being the property of the enemy.

As to the first question, it is a clear and well-recognised rule of International Law that a subject of a belligerent is not at liberty to trade with the enemy without licence from his Sovereign. Whether or not there has, in fact and in intention, been such illegal trading is specially in dispute in this suit. The *Mashona* was chartered by the owners—the British and Colonial Steam Navigation Company (Limited)—to the American and African Steamship Line. Messrs. Bucknall Brothers, who are interested in both companies, are the agents for both owners and charterers, and they have been engaged for years in the trade between European, American, and South African ports, and their steamers engaged in this trade are commonly known as the Bucknall Line. The existing charter party was entered into before hostilities had broken out between our Government and the Republics. The *Mashona* had, under a previous charter, been engaged in the same trade. On the occasion of her last voyage the *Mashona* was laden at New York, after hostilities had commenced, with a general cargo for the British colonial ports and Delagoa Bay, the voyage to terminate at the latter place, which is a neutral port. Most of the cargo for Lourenço Marques was, by the bills of lading, consigned to order, or to the ship's agents, but a few of the bills of lading indicated that, though the goods were to be delivered at Lourenço Marques, their ultimate destination was the Transvaal. On most of the bills of lading, including those to order and to the ship's agents, was indorsed a clause setting forth that, as any cargo which might be deemed to be destined for the Republics was liable to be detained, intercepted, confiscated, or otherwise restrained in the ports of the Cape Colony or Natal, the ship was released from liability in respect of any such cargo detained or intercepted. The *Mashona* was bound first for the British colonial ports, and would have to enter and clear at these ports before proceeding to Delagoa Bay. Immediately on arriving at Algoa Bay, in this colony, the *Mashona* was seized and attached, as well as was such portion of her cargo as had been shipped for Lourenço Marques. Before, however, the *Mashona* put into port, other steamers of the Bucknall Line had arrived at Table Bay, carrying, among other consignments, cargo for Delagoa Bay ultimately destined for the Transvaal.

By our Customs Regulations the manifests of all vessels entering our ports have to be submitted to the authorities, by which means the destination of all the cargo becomes patent to the officials of the Department. After hostilities had commenced, the Customs authorities, at the instance of the High Commissioner, upon instructions of Her Majesty's Secretary of State, required that all vessels arriving with cargo for other ports, before being allowed their clearance, should either land so much of their cargo as was forbidden to be taken to its destination, or, if that was inconvenient, owing to the manner of the ship's stowage, to enter into security bonds undertaking to deliver into the custody of the British Colonial Customs authorities all goods consigned to either of the Republics which were liable to confiscation owing to the said countries being at war with Her Majesty's Government. The agent for the Bucknall Line states, moreover (and this is not denied), that he was informed by the Collector of Customs that the same course would be adopted with all following steamers carrying cargo for Delagoa Bay destined for the Transvaal or Orange Free State.

Owing to its geographical position, Table Bay was the first Cape port usually made by steamers from Europe or America; and the procedure just described was adopted there, not only with the steamers of the Bucknall Line which had arrived before the *Mashona*, but also with vessels belonging to other lines, and the same practice has been continued with all vessels putting into Table Bay subsequently to the date of the arrival of the *Mashona*, none of which vessels

have been seized. It seems most probable from the affidavits that the same course would have been adopted with the *Mashona* itself had its first port of call been Table Bay instead of another Cape port—*viz.* Algoa Bay—and, as far as the owners were concerned, it would also have been followed in the case of the *Mashona* at Port Elizabeth had the naval authorities not interfered. It is beyond doubt in this case that the shipowners and charterers have acted with perfect good faith, and that neither they, nor any of their agents, nor the captain of the vessel, intended to do anything illegal.

On the contrary, they unreservedly desired to submit to the control of the Government authorities here.

It is contended, however, that no matter what *bona fides* existed, through or by the fact of having done an act of trading without licence the ship must in law be declared forfeit. That there is a strict rule of law on the point is indisputable, but, looking at the circumstances of the case, I fail to see that it forces us to a conclusion fatal to the vessel. That there was no intention on the part of the owners to trade illegally is shown by the affidavits of the captain, of the owners, and of their various agents in this colony. The captain says that the idea of trading with the Queen's enemies never entered his mind, and that such a course would not only be repulsive to his British instincts, but contrary to the standing instructions of his owners against acting illegally in any way whatever.

Mr. Clunie, the special travelling agent of Messrs. Bucknall Brothers, was sent out to South Africa shortly after the outbreak of hostilities generally to protect the interests of the company. He was particularly and specially instructed by his principals to give the Imperial Government all the assistance in his power, and he acted to the best of his ability upon these instructions.

The *Zulu*, belonging to the same owners, which had arrived here before the *Mashona*, had cargo on board for Delagoa Bay, as to which the Imperial authorities entertained doubts whether it was for the Transvaal Government or for a private company. The authorities at first authorised this cargo to be sent forward, and it was only on the voluntary efforts and repeated representations of Mr. Clunie that it was ultimately stopped and landed in this colony. Before the arrival of the *Mashona*, Mr. Clunie wrote to the military authorities as follows:

"I have the honour to inform you that in future and during such time as the war lasts a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers arriving at this port will be sent to you for your inspection, as we are desirous of affording any information that may be in the interest of the Imperial Government."

On the arrival of the *Mashona* there was no attempt at any concealment, and the fullest inspection of documents was given before the seizure. True, the agent's letter only mentioned Table Bay, but I do not think that the fact of the first arrival being at Algoa Bay should make any difference, there being the full intention to comply with all the restrictions which had been imposed.

From the affidavit of the local agent it appears that a bond similar to that required here was taken in the case of a previous steamer which had first arrived at Algoa Bay, the sub-collector stating that he acted on instructions from Cape Town. There is no question raised in this case of contraband of war, either actual or constructive. The cargo was of a nature which could lawfully be laden at New York. Trading to Delagoa Bay, another neutral port, was not of itself illegal. Though a quantity of the *Mashona's* cargo for that port was initially attached, at the first hearing the captors abandoned their claim for confiscation as to a large proportion of it. Some of this cargo was for the Portuguese Government, some for

residents at Lourenço Marques; and some, though, according to the manifest, destined for the Transvaal, was claimed by and abandoned to subjects who had withdrawn from the Transvaal on the outbreak of the war, and who desired that their goods should be delivered to them in Natal. The accusation of illegal trading is based on the rule of law as to continuous voyages, by which the ultimate destination of the goods, and not the port of call of the vessel, is looked at.

It must be taken in this case that it was known when some of the goods were taken on board at New York that their final destination was not Lourenço Marques, but the Transvaal. Against this a point might be made in favour of the vessel from the fact that the goods were not to be carried by the shipowners beyond the neutral port, and that in any forwarding from there they were not in any way concerned. The real defence, however, is based on the contention that the goods would not in any event have been taken by the vessel even to the neutral point without the permission of the authorities first being obtained, and this intention was communicated to the shippers before the voyage was begun. The case of the *Mercurius* (Edwards, 53) is an authority for holding that it is not necessary to obtain a licence before the commencement of the voyage. There the voyage was from an enemy's port to a neutral port, but with instructions to put into a British port to obtain a licence, and the proof of such direction and consequent intention being clear, it was held not to be illegal.

That was a much stronger case for the captors than this, as there the seizure was made after leaving the enemy's port, and before reaching a British port. Here the *Mashona* had not been to any enemy's port, and had already reached a British port. That case was decided by Sir William Scot, the soundness of whose ruling on the Law of Prize has been accepted without question by both English and American Courts, and who, moreover, in other cases would not recognise hardship or *bona fides* as excusing a breach of the law when an illegal act had once been committed.

His Lordship, in discussing the rule as to the ulterior destination of the goods determining the character of the trade, said: "Where everything was to be disclosed and referred to the discretion of the English Government, the case cannot be put on a footing with a continuous voyage framed for the mere purpose of literal evasion." The rules of law in matters of prize are founded on considerations of public policy. The policy on which the rule we are considering is founded is to prevent benefit to the enemy, and to assist the operations of the Government, and for this end to secure to the Government full control of any trading. I gather from the books that owing to the advanced requirements of commerce and a broader recognition of the rights of non-combatants, licences would now be granted with greater facility than was formerly the practice.

The particular mode in which the Government consent is expressed is not material (*The Charlotta*, 1 Dods. 390). Here it is not denied that instructions were given by Her Majesty's Secretary of State through the High Commissioner to the Colonial Customs authorities. It is clear, I think, that these instructions were intended to apply to the manner of trading in which this steamer was employed, and was not intended to operate as a licence to any particular vessel. Their object was to place the conveyance of goods to these ports under supervision and control.

Upon complying with the conditions imposed, all vessels belonging as well to the owners of the *Mashona* as to other companies were without distinction allowed both before and after this capture to carry on their operations. It was the commerce that was intended to be legalised, not an individual licence that was granted. There was every desire and intention to comply with these conditions

in the case of the *Mashona*. When, therefore, the authorities announce that a certain procedure is to be followed by all vessels engaged in a particular trade, and where the owners loyally intend to comply with these requirements and abide by the conditions imposed, to allow any one vessel to be pounced down upon and at the same time to allow others to carry on their trade, would be to permit a course of action repugnant to national good faith (see *Usparicha* v. *Noble*, 13 East 340).

Under all the circumstances of this case, in my opinion, the restitution of the *Mashona* ought to be decreed. The next issue for consideration is as to the liability of any of the cargo to confiscation.

After deducting the shipments for which no claims have been filed, and against which judgment is not at present asked, and the goods which the captors have abandoned to the owners, there remain only three consignments to which I need make any reference. As to the first of these, the one thousand cases of oil consigned to Lourenço Marques to the Netherlands South African Railway Company, a company which has its head office in Holland, no formal claim has been filed, but the Consul-General for the Netherlands has interposed, and asked for time to obtain information and instructions. The Court considers this request reasonable, and as further time is to be given, any expression of opinion hereon had better be postponed. The other two consignments to which I refer are those claimed by Leibman & Co. and Bernard Elsasser. Both these parties are neutrals, and both carried on business in the Transvaal before the commencement of hostilities.

In the case of Elsasser the orders for the goods were given months before, and immediately the relations of the respective Governments became strained and war became imminent he did all in his power to stop the goods. Certain goods which had been ordered arrived after the war commenced by the steamer *Beatrice*, and were delivered to the claimant at the port of East London, and sold there. Those that were forwarded by the *Mashona* had been actually alongside the *Beatrice*, but had been shut out. I gather from the affidavits that the claimant did not intend any of these goods now to reach the Transvaal, and had they come forward by the *Beatrice* these very goods would have been delivered to him and sold with the rest in this Colony.

Moreover, other consignments for the Transvaal, which had arrived for the claimant since the seizure of the *Mashona*, had been delivered to and sold by him here. As regards the claim of Messrs. Leibman & Co., one of the partners had left the Transvaal shortly after the commencement of hostilities with the object of stopping their goods from entering the Transvaal. Part of their shipment had also arrived by the *Beatrice*, and had been delivered to them and sold by them at East London. The cargo by the *Mashona* was also intended to be stopped and sold here. Other cargo received by the *Marie* was also delivered at colonial ports. Both these claimants have not closed their businesses in the Transvaal, but not being British subjects, there was no obligation upon them to do so. They are not themselves enemies, but the destination of their goods to the enemy's country impressed them with a hostile character. That destination has now been changed. There has been no concealment in respect of these goods, or other conduct, to raise a suspicion of bad faith.

It is, I think, a fair deduction from the facts that if these very goods had been on any other vessel but the *Mashona* they would have been delivered over to the claimants in this Colony or in Natal. The policy of the law, which is to prevent goods reaching the enemy or to benefit the enemy's country, would not be contravened by giving up these consignments in this Colony, and on the maxim *Cessante ratione legis cessat ipsa lex*, I should have been prepared to decree

restitution of these goods also. But my colleagues do not consider the claimants have done all they ought to have done to remove the hostile character which *primâ facie* attached to their goods. The view they take of the facts, as I understand it, is briefly this, that as far as the documents show, but for the action of the authorities the claimants would have allowed the goods to proceed to their destination. This is a question of fact, and if that is found against the claimants, the goods are liable to confiscation. At all events, as far as the ship is concerned, we are agreed that restitution should be decreed.

MR. JUSTICE LAURENCE:

The steamship *Mashoua* is the property of the British and Colonial Steam Navigation Company, and chartered by the American and African Company, both British companies, having their head offices at the same address in London, managed by the same agents, and apparently in close business relationship with each other. On November 3, 1899, or about three weeks after the beginning of the war between Great Britain and the South African Republic, she sailed from New York with a cargo loaded apparently after hostilities began—one of the witnesses says, "It took between two and three weeks to load her"—for various South African ports, the first port of call being Algoa Bay, in this colony, and the last Delagoa Bay, in a colony of the King of Portugal. A portion of the cargo was consigned to companies, firms, and individuals residing or carrying on business at Pretoria, Johannesburg, and Barberton, in the South African Republic, to whom in the ordinary course it would have been forwarded by rail from Delagoa Bay. The ship was detained in the harbour of Algoa Bay by Her Majesty's ship *Partridge*, and brought to Table Bay, and there placed in the custody of the Marshal of the Prize Court.

The Court is now asked to condemn the ship as good prize on the ground that she was captured while engaged in trading with the enemy, and also to condemn certain portions of the cargo as enemy's property. Without going into unnecessary detail, I propose to make a few general observations as to the principles which must govern the decision of a British Prize Court in a case such as the present.

We have, of course, strictly speaking, to administer the municipal law of England; but that law has to be applied by Prize Courts to the adjudication of the rights and claims of both belligerents and neutrals, and is based on principles which we expect to be observed, and which, in fact, are observed, by the Prize Courts of other civilised nations in similar circumstances, and from this point of view may thus be described as falling within the sphere of public International Law.

The two main points which have to be dealt with in the present case are (1) the right to seize and capture the property of the enemy and his subjects and of residents in a hostile State; (2) the duty of British subjects to abstain from infringing the prohibition against carrying on trade or maintaining commercial relations or intercourse with a hostile State or its subjects. As to the second point, on general principles all intercourse or commerce in time of war between the subjects of hostile States is forbidden.

As Lord Stowell pointed out in the case of the *Hoop*, "This is not a principle peculiar to the Maritime Law of this country; it is laid down by Bynkershoek (in a passage which he cites) as a universal principle of law." He proceeds to show that it was the law not only of England and Holland, but of the other great maritime Powers, France and Spain; "and," he adds, "it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe."

The same principle has been affirmed with equal precision and emphasis not

only in the Admiralty Court, but in the English Courts of Common Law—*e.g.* in the case of *Potts* v. *Bell* (8 T.R. 548), and that of *Willison* v. *Patteson* (7 Taunt. 439). The leading case on the subject I take to be the more recent one of *Esposito* v. *Bowden* (7 E. and B. 763), where it was laid down by Willes, J., delivering the judgment of the Exchequer Chamber, on an appeal heard before six judges, that "the force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy excepting by the Queen's licence."

"Contracts of affreightment," it was added, "cannot lawfully be fulfilled"; and a passage was quoted with approval from Lord Tenterden's work on shipbuilding, in which he says: "If before the commencement of a voyage war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined, the contract for conveyance is at an end, and the merchant must unlade his goods, and the owners find another employment for their ship."

In this case the authorities were fully considered and reviewed, and the case itself was a strong one, for it was that of a neutral ship, with a neutral master, under charter to a British subject, who was held, by reason of the breaking out of war with Russia, to be relieved from his contract to load a cargo at the hostile port of Odessa.

Having thus made a brief preliminary reference to the general principles regulating the duty of our mercantile marine when we are at war, I proceed to examine the question of the liability to seizure of cargo in cases like the present. At a former period, when the war broke out, all property of an enemy or his subjects, whether found in his territory by an invading force, or elsewhere on land, or on the high seas, was, I take it, regarded as liable, in accordance with the rules and practice of war, to seizure and condemnation.

With regard to private property on land, this harsh practice was gradually mitigated by the progress of humanity, and the desire to render the consequences of war as little oppressive to innocent non-combatants as might be consistent with the effective prosecution of the objects for which war is waged. As a rule, the property of such persons, it is now admitted, cannot be seized on land except when required for military purposes, in which case it can be made the subject of a requisition, or, to use the phrase in vogue in this country, "commandeered," but should be paid for at its fair value; and if this cannot be done on the spot, it should be appraised, and a receipt or acknowledgment of debt given to the owner. The rigour of war, however, has not as yet been similarly mitigated by general international agreement, embodied in or adopted by the Municipal Law of the various Powers, with regard to the private property of subjects of the enemy found on the high seas or in a vessel in a port of the other belligerent. Such property belongs as a rule, not to private individuals, but to traders, and one of the main objects of the belligerent—or, as some put it, one of the mildest methods by which a war can be brought to a successful issue—is to cripple the enemy by destroying his commerce and cutting off his supplies. Certain exceptions, however, have been admitted in the interests of neutrals, and in order to enable them during the existence of a war to carry on their trade with as little inconvenience and molestation as possible.

Accordingly those States, including Great Britain, who were parties to the Declaration of Paris of 1856, agreed among themselves that enemy's goods other than contraband should not be liable to seizure if conveyed in a neutral bottom, and similarly, that neutral goods of an innocent character should enjoy immunity,

even if conveyed in a hostile bottom. But these exceptions to the general rule leave untouched the case of the goods of an enemy or his subjects when conveyed in a ship belonging to either belligerent. In both cases both ship and cargo are liable to condemnation if both belong to the enemy, because their character is hostile, and they are protected by no Convention; if the goods belong to the enemy, and the ship to a subject, the goods, because their character is hostile and unprotected, the bottom because it is engaged in an unlawful venture. With regard to the goods, it may be here observed that the real test is the nationality or domicile of the consignee. If he is a subject of the enemy, or a neutral or a British subject residing or carrying on business in the enemy's country, and to that extent impressed with a hostile nationality, the goods consigned to him in the country are liable to condemnation. It may be that in some cases the property has not actually passed from the consignor, or would not be held to have so passed by the Courts of Common Law. Halleck points out that the rules of these Courts "differ in some respects from those which govern Courts of Prize," and cites various cases to illustrate this proposition. He refers to the general rule that "goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to, and to become the property of, a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation." The exception to this rule, where, by special contract or trade usage, the risk of the voyage is on the consignor, are not "admitted in Courts of Prize, for the very conclusive reason that to permit goods in time of war to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. . . . Hence, says Sir William Scot, that part of the contract laying the risk of transportation in time of war upon the neutral consignor is invalid; or rather, as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy's consignee" (Halleck's *International Law*, ed. Baker, vol. ii., pp. 128-130; and of Phillimore, 2nd ed., vol. iii., pp. 740, 741).

It is therefore unnecessary to examine or ascertain the conditions, in such a case as the present, with regard to payment of freight or otherwise, of each particular consignment.

Among the cargo were certain goods (No. 19) the property of the Netherlands Railway Company, which I understand is a Dutch company, but which it is admitted is a railway situated and carrying on business in the Transvaal, and which appears to have a Board of Directors at Pretoria. There is nothing in the papers before the Court to show that any arrangement made between the Foreign Office and the Dutch Government extended to any cargo on board the *Mashona*, or that there was any intention to deliver this oil, not to the consignees, but to the British Consul at Delagoa Bay. It may, however, in the circumstances, be desirable to give the claimants in this case, who have applied for a postponement on the strength of certain diplomatic correspondence, which, as far as I can at present see, does not assist them, an opportunity of adducing further proof, if they can, within a brief delay.

Then there is No. 1 on the manifest, twenty bales of duck, consigned to Johnson & Co. at Pretoria, marked "Transvaal, under rebate," for which there is no claim, and which appears clearly liable to confiscation. "It is not now usual," says Phillimore (vol. iii., pp. 709, 710), "to condemn the goods for want of a claim until a year and a day (a term which was limited by the Prize Act of the Russian war in 1854 to three months) have elapsed from the time of the return of the monition,

except in cases where there is a strong presumption and reasonable proof that the property actually belongs to an enemy." Such presumption and proof appear to be established in this case.

No. 45 seems to be in the same position.

Then there are Nos. 8 and 46, 9 and 10, the property of claimants, neutral subjects, whose businesses, it is not denied, are still being carried on at Pretoria and Barberton respectively. It was for the purpose of these businesses that these goods were shipped to them after hostilities had begun, and there is no proof that they would not have been conveyed thither had they not been intercepted *en route*. I think, therefore, that these claims for release must fail, and that the goods must be taken to be "enemy's property," in accordance with the comprehensive definition of such property applicable to such cases.

I may add that I should have been inclined to take a similar view in the case of Nos. 37 and 43, on the ground that his claimant, Mr. Duncan, does not explicitly state in his affidavit that his business at Barberton has been closed, had not the *Attorney-General*, on behalf of the captors, abandoned these goods. If, then, these goods are liable to condemnation on that ground, *primâ facie* the condemnation of the ship as engaged in a prohibited trade would appear to be the necessary sequel. If she was so engaged, the existence of the Charter is clearly immaterial. The action is *in rem*, and the owners are responsible for the acts of their master as their accredited agent (see Phillimore, vol. iii., 746). That the law on this subject is very strictly enforced both in English and other Prize Courts appears from the facts in the leading case of the *Hoop*, and other cases there cited, and those in American decisions, such as that of the *Rapid*. It is also obviously immaterial whether the trading is to or from a hostile port; but in this case there arises the question, of great importance and apparently not covered by any precisely applicable precedent in a British Court, whether the rule also applies to the case of a ship sailing from one neutral port to another, and conveying goods destined to be landed at the latter for consignees residing in the country of an enemy having no port of his own and obtaining his supplies by land carriage from the port of destination. Can it be said that a ship is not trading with an enemy consignee merely because the freight is paid, not by the consignee himself in the enemy's country, but by his agent at a neutral port? The case of a neutral vessel carrying contraband goods, though not identical, is doubtless somewhat analogous. Lord Stowell, who first developed the doctrine of "continuous voyage," refused to apply it in such cases, and held explicitly, in the case of the *Imina*, that goods going to a neutral port could not be regarded as contraband. A similar view appears to have been taken by the Court of Common Pleas in the case of *Hobbes* v. *Henning* (34 L.J.C.P. 117), referred to by *Mr. Innes*. In the case of the *Commereen*, however, an American Court applied the doctrine of "occasional contraband" to provisions consigned to the neutral port of Bilbao, but destined for the use of the British forces in Spain; and in the more recent American cases of the *Springbok*, the *Bermuda*, the *Stephen Hart*, and the *Peterhof*, the American Courts have applied the theory of "continuous voyage" to cases where it was intended to tranship goods and then convey them to a blockaded port, and also to cases where contraband goods were proved to be intended to be conveyed to the enemy from a neutral port, even when, as in the case of the *Peterhof*, inland transportation was necessary for the purpose.

I need scarcely point out that while trading with an enemy by a ship belonging to the belligerent Power, or running a blockade by a neutral ship, entails its condemnation, no such liability is involved in the carriage of contraband goods

per se by the latter, and that this was the reason why, in the case of the *Peterhof*, the ship itself was held on appeal by the Supreme Court of the United States to be free from liability.

A similar view to that adopted in the United States in the cases above referred to seems to have been taken more recently by the Italian Prize Court, sitting at Rome in 1896, during the war between Italy and Abyssinia, when goods on board the *Doelwyk*, a Dutch ship trading between Rotterdam and the French port of Jibuti, which is the port for Harrar, and situated on the Gulf of Aden, were condemned as contraband. The same principles have been laid down by modern publicists, both English and German, and are embodied in a resolution of the Institut de Droit International, a very authoritative and competent body of experts, at its Congress in 1896, in the following terms:

"La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestables, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale."

It is true that Professor Holland, in his *Manual of Naval Prize Law*, issued by authority of the Admiralty in 1888, does not in terms include a case like the present among those in which "the commander will be justified in considering a British vessel as trading with the enemy." He refers, however, to the case in which "her real port of destination is hostile, though her immediate and apparent port of destination is neutral"; and in a note to this instance he cites Lord Stowell's decision in the case of the *Jonge Pieter*, which turned upon the ultimate destination of the cargo and the absolute prohibition of communication with the enemy "direct or indirect."

There is nothing in Lord Stowell's view as to the conveyance of contraband by neutral vessels, and its limitation to hostile ports, which appears to be inconsistent with holding that a case like the present comes within the prohibition, which he so emphatically affirmed, to the subjects of a belligerent Power of any communication with the enemy whether direct or indirect. The real test, according to the modern view, in both cases, appears to be whether there is clear proof of the ultimate destination, and in the present case such proof is found in the manifest and bills of lading.

If, for example, this ship had been entirely loaded by the charterers at New York with a consignment of goods to be dispatched through agents at Delagoa Bay to the Transvaal Government or to some firm carrying on business at Pretoria, it seems difficult to deny that such a commercial operation would come within the prohibition, which, whatever view may be entertained of its policy, undoubtedly exists; and the fact that other portions of the cargo were the property of consignees at British or neutral ports cannot affect the principle.

It appears to me that, as soon as the war broke out, it became the duty of the master to decline to convey any goods which from the papers in his possession appeared to be the property of enemy consignees. His contract of affreightment could not lawfully be fulfilled, and he should have acted as laid down in the passage from Lord Tenterden's book cited above.

The only point which remains is the question whether it has been established that there was no intention on the part of the master of the ship to trade with the enemy except with permission of the proper authorities.

In the circumstances, such a defence must be established by very clear proof; and although there is no reason whatever to impute any disloyal intention, or *mala fides*, to the owners, charterers, agents or master, I have come reluctantly

to the conclusion that the proof of non-liability on this ground has not been made out.

Had the ship first touched at Cape Town, a course would doubtless have been adopted which, as in other cases, would have secured immunity; and it certainly seems probable, after what had happened in the case of the *Beatrice*, that a similar course would have been followed in this case, had it not been for the intervention of the *Partridge* at Port Elizabeth. The mere fact, however, that the master, in the ordinary routine, would have produced his manifest at the Custom-house, as provided by ss. 19 and 20 of Act 10 of 1872, is not in itself sufficient. There is nothing to show that the attention of the officer would have been specifically called to the ultimate destination of any particular items in the manifest of cargo for Delagoa Bay, or that the matter would have come within his purview. There is no affidavit from the sub-collector there that his instructions were of such a nature that this would necessarily have happened.

The local agent does not allege that he would of his own motion have brought the matter to the collector's notice. In the case of the *Hoop* the claimants proved that they had obtained permission to import from the Commissioners of Customs at Glasgow, fortified by the opinion of the legal advisers of the latter; but the trade was held to be nevertheless unlawful, the permission not to be equivalent to a licence from the Crown, and the claim accordingly failed. In the case of the *Mercurius*, decided by Lord Stowell in 1808 (Edwards, 53), which is certainly the strongest case in favour of the claimants, the Court held it proved that she was, when seized, on her way to a British port for the purpose of applying for a licence to proceed from a hostile to a neutral port.

That she had directions to do so was, as the Court held, "disclosed in the papers and as strongly guaranteed as any fact could be." If in this case the *Mashona* had taken a cargo at New York for Delagoa Bay only, but was proved to have touched at a British port *proprio motu*, and under directions from the charterers, for a similar purpose, the cases would have been parallel. As it is, I fear that the parallel fails in an essential particular. In the present case, as I suggested during the argument, there seems to be an absence of proof that it was not the intention of the master to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that he intended to apply for and obtain a licence before engaging in intercourse which, in the absence of such licence, was of an unlawful character. From the moment that this ship left New York Harbour I think that she was liable *stricto jure*—a liability which she doubtless shared with many other vessels of the British mercantile marine—to seizure and condemnation; as she was still without a licence when seized, *stricto jure*, the liability remains.

At the same time I must add that I in no way regret that my colleagues have been able to come to the conclusion that the further proof adduced by the charterers is sufficient for the discharge of the ship; since, had she been condemned, it would have been difficult to conceive a stronger case for the indulgence of the Crown.

The *Attorney-General* and *Mr. Innes* argued the question of costs, the former contending that to pay the costs out of the sale of the confiscated goods was virtually condemning the captors to pay their own costs, whereas it had been clearly laid down by the Privy Council in *Schalk* v. *Otter and Dyke* that captors must be granted their costs where probable cause for the capture was shown.

After argument:

The CHIEF JUSTICE said it did not follow that the ship was in no way to blame in taking this cargo on board. There did not appear to have been any actual

communication between the actual captor and the High Commissioner, but there was reasonable and probable cause for seizing the ship. There was certainly carelessness in taking the cargo on board at New York, and although the intention was perhaps not to have landed it without consent of the proper authorities, still the ship had the goods on board. Under the circumstances he thought the owners and charterers should pay the costs of the captors, save and except those involved in bringing the vessel round to Algoa Bay. There would be no order against the owners of the cargo not confiscated ; the goods not claimed would be sold, and the proceeds lodged with the Marshal for a year and a day from the date of the monition.

Their Lordships concurred.

THE NEW COMMERCIAL CODE OF GERMANY.

[*Contributed by* G. H. B. Kenrick, Esq., LL.D.]

Translation of Foreign Codes.—The publication of an English translation of the new Commercial Code for the German Empire gives occasion for a few observations on the present inaccessibility of foreign law to the English lawyer. It is certainly somewhat remarkable that so few of the many foreign legal Codes have been translated into our language. With the exception of the one in question and a translation of the German Penal Code, there exists not a single English translation of the various Codes of Germany, Russia, Austria, Italy, Spain, Portugal, Belgium, the Netherlands, Sweden, Norway, or Switzerland, though most, if not all, of these have been translated into French. Authoritative French translations of the most important foreign Codes are comprised in the *Collection de Codes Étrangers* published in Paris. With regard to the French Codes there is an old English translation of the Code Napoléon, and the Civil Code and Code of Commerce have also been translated; but there is no collective English translation of the modern Codes of France.

It may indeed be said that there is not one of our many public libraries in England (not even the libraries of the Inns of Court, the Universities, or the British Museum) which contains a complete and up-to-date collection of the legal Codes of the great European States.

The ascertainment of the law of a foreign State becomes material in many cases before the English Courts; and although, as is well known, the foreign law in such cases must be proved as a fact by the evidence of experts, it is frequently, before the stage of litigation is reached, of great importance to the legal profession and to other members of the community that foreign law should be reasonably accessible.

In the interests of the science of Comparative Legislation, not to speak of the practical interests of the legal profession and others, these Codes of foreign law should at least find a place in the libraries of the four Inns of Court. It is much to be desired that they should all be also accurately and reliably translated into the English language. Such translation should not indeed be left to individual enterprise, which has so far resulted in nearly all the Codes remaining untranslated; the translation should be officially

undertaken at the public expense, and entrusted to a carefully selected Commission composed of scientific English lawyers as well as of experts skilled in the foreign language and law. As a result, the legal systems of the great European States with which we are politically and commercially in continual competition would be rendered accessible—which at present they are not—to the English-speaking lawyer and to the British and Colonial Courts. The juridical value of such a work would be undoubted, and it is not easy to define the limits of its practical benefits.

The New German Code.—Private enterprise has in the meantime supplied us with a translation of the most recent of the foreign Codes—the Commercial Code for the German Empire, translated from the official text by Mr. Bernard A. Platt. This is a step in the right direction.

The extraordinarily rapid advance made during recent years by the German Empire in the trade of the world, and the keen commercial rivalry thereby engendered, afford a sufficient reason, irrespective of the benefits to comparative law, for placing before Englishmen—alas! always too little instructed in foreign tongues—a translation of the new Commercial Code, embodying the provisions of German Mercantile Law by which German trade and commerce are regulated. As, however, Mr. Platt's work is a simple translation of the Code from the German without any annotation or commentary, and does not contain any reference to or comparison with the corresponding law of England, a few words of comparison and comment may not be out of place in this article.

The new German Commercial Code came into operation (with the exception of a few Articles which have been law since January 1, 1898) contemporaneously with the new Civil Code of Germany on the first day of the present year.

Arrangement of the Code.—The Commercial Code is divided into four books, Book I. treating of Commerce in General, Book II. of Trading Companies and Partnership, Book III. of Commercial Transactions, Book IV. of Maritime Commerce. These four books are subdivided into Sections and Articles, the whole Code comprising 905 Articles. By way of comparison it may be mentioned that the French Code of Commerce adopts as its main divisions Book I., of Commerce in General; Book II., of Maritime Commerce; Book III., of Bankruptcy; and Book IV., of Commercial Jurisdiction. The Russian Code of Commerce (of which there was an official edition in 1893, which was translated into French in 1898) also divides the subject into four books: Book I., Commercial Agreements and Contracts, including Commercial Agency, Company and Partnership Law; Book II., Maritime Commerce; Book III., Commercial Institutions, including Exchanges (*Bourses*) and Markets, Trade Books, Weights and Measures, and Warehouses.

Under the head of Commerce in General, Book I. of the German Code enunciates the law relating to Traders, the Trade Register, Firm Names,

Trade Books, Agency and Authority, Clerks and Apprentices, Agents and Brokers.

Registration of Trading Firms.—There exists under the German law an elaborate system of registration of trading firms and partnerships analogous in many respects to our system of registration of joint stock companies. The importance and advantages of such a compulsory registration of traders and firm names in addition to company registration are obvious. In this respect, however, the English Commercial Law is deficient, for as yet a compulsory trade register is unknown. It may be of interest here to observe that to some extent a remedy for this defect is suggested by contemplated legislation. The Registration of Firms Bill, which was committed to a Select Committee on May 2 last, is intended to provide for the registration of firms and of persons carrying on business under names or styles other than their own. The Bill, if it ever become law, will require any two or more persons carrying on any business in common with a view of profit, and every person carrying on business under any trademark consisting of or containing any name or addition other than the full or usual name of that person, to register with the Registrar of Joint Stock Companies the nature of the business, the full names, residences, and other occupations of the persons carrying on such business, and other particulars. This measure when passed will place this branch of English Mercantile Law on a similar footing to the German law.

Commercial Agency.—The Articles in the Commercial Code on Agency (Articles 84 to 92 and 383 to 406 inclusive) contain a series of isolated rules, in no sense expounding the general law of Principal and Agent, but applying merely to particular mercantile transactions. For the general law of Contract reference must be made to the Civil Code. The possibility of codifying the law of Agency in English law is amply demonstrated by Mr. Bowstead's *Digest of the Law of Agency*, the second edition of which was published in 1898. Its expediency is proved by the utility of the codifying Statutes, the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893; but as yet there is no English statutory codification of this important branch of law.

Partnership and Company Law.—The Law of Partnership and Company Law form the topics of Book II. of the Commercial Code, s. 1 of which treats of the constitution of a partnership, the mutual rights of partners, the legal position of partners with regard to third parties, the dissolution of a partnership and the retirement of partners, balancing accounts on dissolution of partnership, and prescription in Partnership Law.

The Partnership Act, 1890, which consolidated the English Law of Partnership (with the exception of the rules of procedure in actions by and against partnership firms, and the law regulating the bankruptcy administration of partnership estates), forms a practical and valuable codification of the English law on the subject, and it is noteworthy that the

English consolidating Statute is more scientific and comprehensive in detail than the corresponding Articles of the German Commercial Code. This is at once observable on comparing the imperfect definition of the nature and constitution of a partnership contained in the German Code with the careful definition of the nature of partnership and the exact rules for determining the existence of a partnership which are enunciated in the English Act.

The "Commandite" Company.—The second section of Book II. introduces the subject of a "Commandite Company." This institution, which, though well known to the Continental legal systems, finds no parallel in English law, is defined by Article 161 as a company which has for its object the carrying on of a business under a firm name, the responsibility of one or several of the partners with regard to the creditors of the company being limited to the amount of their subscribed capital (sleeping partners), whilst that of the other partners is unlimited (personally responsible partners).

The English Partnership Bill of 1879, as framed by Sir Frederick Pollock, authorised and regulated the formation of private partnerships with limited liability, corresponding to the *société en commandite* of French and German law; but this scheme for the introduction into English law of a system of limited partnership was rejected by a Select Committee, and forms no part of the Partnership Act, 1890.

Limited Liability.—The law relating to the Limited Liability Company is next treated of in the Code. In such a company all the members participate in the share capital of the company, without being held personally liable for the obligations of the company. After certain general provisions relating to such a company, rules follow regulating the legal relationship of the company and the shareholders, the internal organisation and management, alterations in the Articles of Association, the dissolution and nullity of a company, and penal provisions. In view of the present state of English Company Law the following penal provision of Article 312 is of interest: "Members of the Directorate, or of the Council of Supervision, or Liquidators, if they act contrary to the interests of the company, are liable to imprisonment and a fine not exceeding twenty thousand marks. They can at the same time be deprived of their civil rights. If there are extenuating circumstances, the fine only may be inflicted."

The "Commandite Company divided into Shares" and "Dormant Partnership" form the topics of ss. 4 and 5 of Book II. The nature of a commandite company divided into shares is indicated in Article 320. At least one of the members of a commandite company divided into shares assumes unlimited liability with regard to creditors of the company (the personally responsible member), whilst the rest are interested only to the extent of their subscription to the capital of the company divided into shares (the shareholders).

"Commercial Transactions."—"Commercial Transactions," the subject of

Book III., are comprised under the heads of General Provisions, Purchase and Sale, Agency, Forwarding Agency (a forwarding agent is defined as one who, by profession, undertakes the sending of goods in his own name on account of another, the sender, through the intervention of a carrier or the owner of a ship), Warehousing, the Business of Carriers, and the Conveyance of Goods and Persons by Rail. The subject of purchase and sale is treated of very inadequately in ten Articles, which, however, must be regarded as merely supplemental to the provisions of the German Civil Code. The English Sale of Goods Act, 1893, forms a model codification of this extremely important branch of the law which will compare very favourably with the German codification of the subject.

Maritime Commerce.—The last book of the Code, Book IV., on Maritime Commerce, includes the Law Relating to the Ownership and Chartering of Ships, the Transport of Passengers, Bottomry, Average (General and Particular), Damage Caused by the Collision of Ships, Salvage, the Ship's Creditors, and Marine Insurance. The elaborate provisions of the new German Code on the subject of Marine Insurance, contained in Articles 778 to 900 inclusive, should prove of especial interest to the student of Private International Law, as this was one of the topics under discussion and consideration at the International Law Association Conference at Buffalo, New York, last year. At that conference a scheme for promoting uniformity in the law governing policies of marine insurance—which is likely to be of considerable practical importance—was brought forward by Mr. T. G. Carver, Q.C., of the English Bar; and ten resolutions in the form of rules carrying out principles which were agreed to were adopted by the conference. The limitations of space preclude any comparison here of these resolutions with the Articles of the Code regulating the German Law of Marine Insurance, but the Marine Insurance Resolutions passed at the Conference of the International Law Association will be found set out in Mr. T. G. Carver's article in No. 3 (New Series) of this Journal, at p. 383.

Criticism of the Code.—A new Code of the Commercial Law of Germany has many claims to the consideration of the English legal world, not the least being that it directs attention to the practical possibility of reducing to a coherent whole, and within a convenient compass, the mass of legal rules regulating the trade and mercantile transactions of so advanced a nation as Germany, involved as they are by all the complications of modern civilisation. The absence is, however, noticeable in the German Commercial Code of any systematic exposition within its limits of such subjects as Bankruptcy, Guaranty or Suretyship, Patents and Trademarks, Bills of Exchange and other negotiable instruments, Fire and Life Insurance, and other branches of Mercantile Law which would seem to demand a place in the Commercial Code of any legal system. Bills of Exchange, Trademarks and Patents, and Bankruptcy, it is to be observed, are separately codified in German law. In the French Code of Commerce the Law of

Bankruptcy and of Bills of Exchange is included, and forms a substantive part of the Code. Continuity of treatment of the various branches of Commercial Law appears to be wanting in the German Code; and one comes to the conclusion that the new German Commercial Code should be viewed rather as a practical supplement to the German Civil Code and the other existing German legislation than as an exhaustive juridical exposition of German Commercial Law. Criticism is easy. But, to use the words of Austin, the vast difficulty of successful codification no rational advocate of codification will deny or doubt; its impossibility none of its rational opponents will venture to affirm.

CLASSIFICATION OF CRIMES IN MODERN CODES.

THERE have been few more searching studies of the differences in the classification of crimes, their definitions, defences, aggravations, or extenuating circumstances and punishments in the chief countries of Europe than Signor Bosco's contribution to the last number of the *Bulletin de l'Institut International de Statistique*. When completed, Professor Von Liszt's volumes, published at the instance of the *Union Internationale de Droit Pénal*, may tell all that Signor Bosco's tells, and much more; but nothing so exhaustive as this paper is readily accessible. It may suggest hints to those who think our law as to murder irrational. Primarily a statistical study, it touches questions of importance to the jurist. It prepares the way for a reconsideration of definitions and classifications in English Criminal Law which are no longer in harmony with prevalent moral sentiments, and against which juries rebel. One clear impression is left by the paper: in all European countries Criminal Law is in a state of instability or flux; the old boundaries of crime are being revised; conceptions of what is crime itself, what is the efficacy of punishment, are changing; new theories as to responsibility are creeping into Statute Books; the teaching of modern psychology is affecting legislation; a long succession of writers whose aim has been to put law and morality in antagonism have done their work; and there are in progress many experiments indicative of dissatisfaction with the older order and distinctions. The paradoxes defended or problems propounded in plays and novels, the controversies going on among doctors, lawyers, and moralists as to insanity and responsibility, the prevalence of new ideas as to the causes of crime, and the popularising of certain philosophical doctrines, are affecting the Criminal Law of every country. A poet conceives a situation in which ordinary rules break down, and the higher law intervenes. Antigone defies Creon's decrees—she owes allegiance to the dead rather than the living; Hamlet must kill his uncle; the heroes and heroines of Dumas *fils* and Ibsen find themselves in straits in which to follow conventional rules is to do wrong. A rude and imperfect Criminal Law does not deal with these niceties and problems. It allows the jury to cut the knot, or it trusts to the power of pardon, residing somewhere, to alleviate the hardest cases. But—and it is the second impression left by

Signor Bosco's paper—the modern legislator tries to do more than his predecessor; he is not content to draw a few lines, leaving all other distinctions to be determined by the good sense of the jury or the judge. The later Codes enter into complex distinctions, and do not lump together the variety of degrees and forms of guilt loosely comprehended in some such terms as "murder" and "larceny." Classifications based on motives have been attempted. Uncertain and difficult to apply, they are nevertheless a characteristic of some modern Codes. It is significant that the favourite field for novelties and experiments is the law as to homicide. As to all the so-called "natural crimes" there is uncertainty and doubt and controversy, and nowhere are they more prevalent than in regard to homicide.

The paper deals with the following crimes: homicide (*Todtung*), etc.; *lesion personelle* (*Körperverletzung*), assaults, etc.; rape (*Viol*); *Attentat à la pudeur*; theft (*Vol*); robbery (*Rapine*); extortion. Homicide is treated in much the same manner in all the Codes mentioned; but voluntary homicide is not always sharply distinguished from accidental homicide:

> La loi anglaise ne fait pas même cette distinction, et considère le crime d'homicide à un point de vue générale que les autres législations Européennes.

The English law as to homicide goes less than modern codes into details;[1] thus it attaches little importance to the means employed. It is otherwise in modern Codes. In Spanish law, for example, are grouped together homicides committed in an insidious manner, by means of drowning, fire, or poison, or with cruelty, or by augmenting the sufferings of the victim. The Spanish Code also lays stress on the point whether the murder was committed for a price or in consequence of a promise of remuneration. What is the offence of one who, not wishing to take life, does desire to wound, or assault, or steal? The answer of English law to this question is, as every one knows, highly artificial. Homicide committed in endeavouring to commit a felony is murder. The Continental Codes are not consistent as to this. But speaking broadly, in none of them is such an offence treated as homicide, the *animus occidendi* being absent. Such offences are, as a rule, treated as aggravated cases of the offences, accidentally it may be said, causing death. Sometimes they pass unpunished. Many Codes treat them as aggravated forms of *lésion personelle*. This phrase, borrowed from the Italian Code, is used by Signor Bosco in a comprehensive sense. It is not equivalent to assault; it includes the *Körperverletzung* of the German Code and the *Körpertiche Beschädigung* of the Austrian Code and the *lezione personale* of Italian law. It is injury in a very wide sense.

The general results of Signor Bosco's study are thus summed up: "Lesion" committed voluntarily, and resulting in death, but without the

[1] Note the curious classification of homicide by Plato in the Laws IX. 865.

intention of killing, is not classed as homicide in the German, Austrian, Italian, and Swedish Codes, but is regarded as an example of *lésions corporelles graves*. One of the latest Codes is the Hungarian, which treats these cases in the following manner :

> Lorsque la mort est survenue à la suite d'une autre infraction, sans que l'auteur eût le dessein de la causer, elle est regardée comme une circonstance aggravante de cette infraction. . . . Les crimes et les délits à l'égard desquels le Code Hongrois prévoit la mort de la victime comme une circonstance aggravante sont les suivants ; le viol (Art. 237); les actes impudiques contre nature (Art. 242); l'exposition ou l'abandon d'enfants (Art. 287) ; le duel (Art. 289) ; le empoisonnement de puits, conduites d'eau, et la vente d'objets alimentaires mélangés de substances dangereuses pour la vie ou nuisibles à la santé (Art. 315); la violation de la liberté personelle (Art. 325); l'incendie (Art. 424 et 425); l'inondation (Art. 431 et 432); les dommages aux chemins de fer, navires, etc.

Speaking broadly, English law does not recognise any differences between homicides in the cases of persons closely related and strangers. Such a phrase as "parricide" is a survival of another system of law than our own. In many modern Codes much turns on the relationship of the person killed to the criminal. For example, the murder of an "ascendant" is treated by many Codes as a crime of aggravated atrocity. According to other Codes, the homicides of "descendants," or husbands or wives, are viewed as of exceptional guilt.

Nowhere is the working of what may be called the modern spirit in regard to crime more clearly seen than in the lenient treatment of infanticide. The tendency is to view mercifully the killing of a child in hours of pain and, probably, solitude, misery, and shame.[1] The sense of pity—some prefer to say justice—which juries called upon to apply English law rarely fail to show, has affected European Codes. Some of them (the German, Austrian, Belgian, Hungarian, Dutch and Swedish) deal only with cases in which the mother commits the crime ; others contemplate the husband, the brothers or sisters as the criminal. Some laws (the German, Belgian, Hungarian, Swedish) take account only of the homicide of illegitimate children ; the homicides of other children come under the general law. The offence of infanticide, according to some Codes, is treated leniently only when committed at the moment of birth or shortly after, while the Spanish, Italian, and Dutch Codes find one of the characteristics of the offence in the motive of fear or desire to preserve the honour of some one.

What are extenuating circumstances? How do they differ from complete defences? How far is the motive of the criminal to be considered as a mitigating circumstance? To all these questions the answers are very diverse. The German Code admits as an extenuating fact the circumstance that a blow was struck when the criminal was in a fit of anger brought about by the unprovoked conduct of his assailant. The

[1] See Berner's *Lehrbuch* as to changes in law as to infanticide.

Austrian Code takes into consideration the fact that the crime was committed in a state of excitement natural to human nature. Several Codes treat more leniently homicide committed in the case of husband and wife. The Hungarian Code mentions, among the circumstances which diminish the enormity of the crime, "the state of violent *surexcitation*."

A general view of Signor Bosco's classification of homicides may be thus shown:[1]

AUSTRIA.

I. VOLUNTARY HOMICIDE (*Mord*, s. 135[4]).

II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.

1. *Means employed:* Homicide committed by means of poison or any other secret means (*Meuchelmord*, s. 135 [1]).
2. *Connected with other Offences:* Homicide committed for the purpose of gaining possession of some article belonging to another by means of violence to the person of any one (*Raubmord*, s. 135 [2]).
3. *Mandate or Agency:* Homicide to the commission of which the criminal has been induced by a reward or by some other means (*Bestellte Mord*, s. 135 [3]).

III. INFANTICIDE. Voluntary homicide committed by a mother of a child who, at the time of birth, takes away thelife of her child, legitimate or illegitimate, or who, by forgetting to obtain for it necessary assistance, suffers it to die (*Kindesmord*, s. 139).

BELGIUM.

I. HOMICIDE COMMITTED WITH THE INTENTION OF KILLING (*Meurtre*, Art. 393).

II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.

1. *Premeditation:* Voluntary homicide committed with premeditation (*Assassinat*, Art. 296).
2. *Relationship of the Person:* Voluntary killing of parents, natural or legitimate, or of an *ascendant* (*Parricide*, Art. 395 [1]). Homicide, premeditated or otherwise, of a child at the moment of birth or immediately after (Art. 396, ss. 1 and 2).
3. *Means employed:* Voluntary homicide committed by means of substances which may cause death more or less promptly (*Empoisonnement*, Art. 397).
4. *Connected with other Offences: Meurtre* committed to facilitate theft or extortion or to secure impunity (Art. 475).

III. INFANTICIDE. Homicide, premeditated or not, by a mother of an illegitimate child at the moment of birth.

FRANCE.

I. VOLUNTARY HOMICIDE (*Meurtre*, Art. 295).

II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.

1. *Premeditation:* Voluntary homicide committed with premeditation, or *guet-apens* (*Assassinat*, Art. 296).

[1] In the case of Germany the classification of injuries (*lesions*, etc.) resulting in death is given.

2. *Relation of Person:* Voluntary homicide of parents, legitimate, natural, or by adoption, or of an *ascendant* (*Parricide*, Art. 299). Blows struck or wounds inflicted with the intention of causing the death of agents of the *force publique* or of citizens entrusted with some public service (Art. 233).
3. *Means employed:* Attempt on the life of a person by means which may cause death more or less swiftly, whatever be the substance employed or administered, or whatever be the consequences (*Empoisonnement*, Art. 301).
4. *Connected with other Offences: Meurtre*, which precedes, accompanies, or follows on the crime (Art. 304 [1]). *Meurtre*, designed to prepare, facilitate, or carry out a *délit*, whether to aid the flight or secure the impunity of the parties to or accomplices in such *délit* (Art. 304 [2]).

III. Infanticide. Voluntary homicide of a new-born child (Art. 300).

Germany.

I. Voluntary Homicide without Premeditation (*Todtschlag*).
1. Voluntary *lesion* causing death, but unintentionally (*Tödliche Körperverletzung*, s. 226).
2. Voluntary *lesion* followed by death, but without intention of causing it.
Means employed: Administration of poison or other substance injurious to health having occasioned death (*Vergiftung*, s. 229).

II. Voluntary Homicide under Circumstances of Aggravation.
1. *Premeditated Homicide:* Voluntary homicide with premeditation (*Mord*, s. 211).
2. *Relation of Person:* Homicide of an *ascendant* (s. 215).
3. *Connected with another Offence:* Voluntary homicide (*Todtschlag*) committed while carrying out a punishable act, so as to remove some hindrance to the execution of such act or to avoid arrest *en flagrant délit*, s. 214).

III. Infanticide. Intentional homicide of an illegitimate child committed by the mother during or immediately after its birth (*Kindesmord*, s. 217).

Holland.

I. Voluntary Homicide (*Doodslag*) committed with the intention of taking away the life of another (Art. 287).

II. Voluntary Homicide under Circumstances of Aggravation.
1. *Premeditation:* Voluntary homicide with the intention of taking away the life of another, with premeditation (*Moord*, Art. 289).
2. *Connected with other Offences:* Voluntary homicide (*Doodslag*) followed, accompanied, or preceded by a punishable act, and committed with the design of facilitating the execution of the same, or, in case of *flagrant délit*, of securing for oneself or accomplices impunity or possession of articles illegally obtained (Art. 288).

III. Infanticide. Homicide of a child at the moment of birth or a little time after, committed by the mother with the intention of taking away life, under the impulse of fear that the *accouchement* should be discovered (*Kinderdoodslag*, Art. 290).

Hungary.

I. Voluntary Homicide (Art. 279). Voluntary homicide committed in a state of *surexcitation violente* (Art. 281).

II. Voluntary Homicide under Circumstances of Aggravation.

1. *Premeditation:* Homicide committed with premeditated design.
2. *Relationship of the Person:* Voluntary homicide committed in the case of a legitimate relation in the ascending line, or of a mother by her natural child, or of a father who has legitimised such child, or husband or wife, or of several persons (Art. 280). Voluntary homicide committed in a state of violent *surexcitation*, of a relation in the ascending or descending line, or of husband or wife (Art. 281 [2]).

III. Infanticide. Homicide committed voluntarily by the mother in the case of a child born out of wedlock at the moment of birth or immediately after (Art. 284).

Italy.

I. Voluntary Homicide (*Omicidio volontario*, Art. 364).

1. *Premeditation:* Voluntary homicide with premeditation (Art. 366 [2]).
2. *Relationship of the Person:* Voluntary homicide of a legitimate *ascendant* or *descendant*, of the father, the mother, or of a natural son, who has been legally recognised. Voluntary homicide of husband or wife, a brother or a sister, an "adoptif" father or mother, adopted son, or *des alliés* in the direct line (Art. 365 [1]). Voluntary homicide of a member of Parliament or of a public functionary by reason of his functions (Art. 366 [2]).
3. *Means employed:* Voluntary homicide by means of poison or committed with no other motive than brutal wickedness or with aggravated cruelty (Art. 366 [3]). Voluntary homicide by means of fire, drowning, etc., or any other *délit* against the public safety (Art. 366 [4]).
4. *Connected with other Offences:* Voluntary homicide committed with the object of preparing, facilitating, or carrying out another offence (Art. 366 [5]). Voluntary homicide committed immediately after the commission of another offence, with the object of securing profit or advantage, or by reason of not having attained the object in view, or to conceal or suppress the evidence of the offence, or to secure impunity for oneself or others

II. Infanticide. Voluntary homicide of an infant who has not been *declaré à l'état civil* during the first five days after its birth to save the honour of the guilty person or his wife, his mother, his *descendants*, his adopted daughter or sister (Art. 369).

Spain.

I. Voluntary Homicide. Homicide without any of the circumstances constituting *parricidio* or *asesinato* (Art. 419). Homicide committed during a quarrel or during a riot or tumult (Art. 420).

II. Voluntary Homicide under Circumstances of Aggravation.

1. *Premeditation:* Homicide committed with premeditation (*Asesinato*, Art. 418 [4]).
2. *Relationship of the Person:* Homicide of *ascendants* or *descendants*, legitimate or illegitimate, and of husband or wife. Homicide of a new-born child committed by any one (424 s. 3).

3. *Means employed:* Homicide committed in an insidious or underhand manner (*Asesinato*, Art. 418 [1]). Homicide committed by means of *inundation*, fire, or poison (*Asesinato*, Art. 418 [3]). Homicide committed with cruelty and serious aggravation of the pain suffered (*Asesinato*, Art. 418 [5]).
4. *Mandate or Agency:* Homicide committed for reward or promise of remuneration (*Asesinato*, Art. 418 [2]).

III. Infanticide. Homicide of an infant who has not lived three days, committed by the mother to hide her dishonour, or by the maternal *ascendants* with the same intention.

Sweden.

I. Voluntary Homicide, committed with the intention of taking life, but without premeditation.

II. Voluntary Homicide under Circumstances of Aggravation.
1. *Premeditation:* Homicide committed with the intention of killing and with premeditation, or *assassination* (*Mord*, c. 14, s. 1).
2. *Relationship of the Person:* Homicide, premeditated or otherwise, of an *ascendant*, *conjoint*, father- or mother-in-law, parents by adoption, tutor, master, or any one in authority (c. 14, s. 35).

III. Infanticide. Infanticide or voluntary homicide, committed during or after *accouchement* by a woman who is *enceinte* in consequence of illegitimate relations, of a new-born child by acts of violence or failure to do what was necessary to preserve the life of the child (c. 14, s. 22).

Attempts at infanticide by a mother who has deliberately sought to kill her child, but who has been prevented from doing so by circumstances beyond her control (c. 14, s. 23).

Infanticide by a woman who has deliberately sought a solitary place for her *accouchement*, and has caused, without premeditation, the death of the child by want of due care (Art. 24, s. 24).

Space does not permit reference to the details given by Signor Bosco as to other offences; but from his remarks to the effect that several Codes retain traces of archaic ideas as to larceny or theft, the following passage may be cited:

La protection spéciale donnée à la propriété agricole et à l'élevage des animaux, qui constituaient jadis la source principale de la richesse, l'importance attribuée à certains circonstances—telles que le temp de nuit, ou le lieu isolé, ou les chemins publics, à cause du défaut de sûreté qui étaient presque général, donnent lieu, même aujourd'hui, à des aggravations du vol dans les lois de plusieurs pays.

Only a few Codes, such as the German and Italian, take special note as to theft, of the peculiar facts of modern industry, and modern modes of transport.

SOME NOTES ON FOREIGN COMPANIES IN ENGLAND.

[*Contributed by* Israel Davis, Esq.]

Foreign Companies in England.—The decision of the French Court of Cassation in *La Construction, Limited*, discussed in No. 2 of the Journal for 1899, and by Mr. Thomas Barclay in his work on Companies in France, has given rise to enquiries into the legal situation of foreign companies in this country. The subject is to be reported upon by the writer in the section of Commercial Law of the International Congress on Comparative Law to be held in Paris during the Exhibition. The case of *La Construction, Limited*, raised much doubt as to the position of British companies in France. It may be said, briefly, that in England a similar decision is not to be feared. The status of foreign companies in England was examined in an appendix to Lord Lindley's classical work on Partnership, reprinted with additions in Lindley on Companies, and later cases illustrate the conclusions he arrived at.

Position of Foreign Companies at Common Law.—The English Courts, by Common Law, and without any legislation, recognise the right of foreign companies to carry on business in this country, to sue and to defend proceedings here;[1] and no previous condition, such as that of registration in England, has been imposed. In some of the British colonies it may be necessary that foreign companies should be registered in the colonies before they can carry on business with the facilities which they enjoy after registration. An attempt, made in an appeal from Western Australia, to induce the Privy Council to construe a Local Ordinance as having that effect was unsuccessful,[2] but such legislation would seem to be within the competence of the Colonial Legislatures.[3] Such regulations, when made by the colonies, might

[1] *Dutch West India Co.* v. *Moses*, 1 Strange 611; Lindley on Companies, 5th ed., 909.

[2] *Bateman* v. *Service*, 6 App. Cas. 386. The Canadian cases are discussed in the Appendix to Lord Lindley's work. In Natal, English companies have been advised by Colonial lawyers to re-register their memorandum and articles of association in the colony with the registrar of deeds.

[3] Compare *Liverpool Insurance Co.* v. *Massachusetts*, 10 Wallace 566 (Supreme Court, 1870), where an English insurance company pleaded in vain that it was not incorporated, and was held liable to a tax imposed on foreign insurance companies.

of course apply to British companies as well as to those of foreign nations; but in England itself a foreign company cannot be registered under the Companies Acts.[1] Foreign individuals may doubtless register themselves here as a company, but the company thus incorporated by registration would be, at least *primâ facie*, a British one.[2]

Status of Foreign Companies.—The status of a foreign company is determined by its own statutes; and if statutes validly framed in accordance with the law of a foreign Power recognised by Great Britain limit the liability of members of an incorporated company, English creditors would be forced to respect such limitation. But while the right to sue (subject of course to the rules as to giving security for costs) and be sued in the corporate name may be regarded as completely ascertained, difficult questions may arise whether particular foreign societies are to be assimilated in English law to private partnerships or to incorporated companies. The determination of this question will be important in deciding whether individual members of the societies may be sued or made liable in execution. It was touched upon in argument in *General Steam Navigation Company* v. *Guillon*, 11 M. & W. 877 (1843), and again in the American case of *Liverpool Insurance Company* v. *Massachusetts*, 10 Wallace 566, already cited. It will be remembered that, while in the view of the English law a private partnership is not a moral person, but only an aggregation of individuals, subject indeed to specific rules in bankruptcy, a more common conception among Continental jurists is that a partnership exists as a separate entity. It was argued in the recent case of *A.-G.* v. *Jewish Colonisation Association*, 16 T.L.R. 385 (May 16, 1900), in accordance with dicta in *Cesena Sulphur Co.*, 1 Ex. D. 428, that a company registered in England as an English company might become a foreign company by holding its meetings and conducting its operations in France; and if this argument had succeeded, the converse would naturally apply, that a foreign company might become in effect an English one by similar means. But the contention did not find favour with the Queen's Bench Division. A like thesis is supported in a note to Story's *Conflict of Laws* (8th ed., by Melville Bigelow, p. 177, on s. 106). Mr. Dicey briefly states that registration is not decisive of domicil.[3] It may be safely said that circumstances of sufficient weight to rebut the inference as to domicil which naturally arises from registration will rarely (if ever) occur in practice. To escape certain provisions of the Joint Stock Companies Acts, companies have sometimes been registered in the Isle of Man, or in the Channel Islands, to carry on business in the United Kingdom. The freedom with which companies thus incorporated trade is an example of the liberty accorded in England to foreign companies. Similarly, companies formed for the purpose of trading in England have been registered in Scotland in order to evade the Companies

[1] Buckley on Companies, pp. 4 and 9; *Bulkeley* v. *Schutz*, 3 P.C. 764.
[2] Companies Act, 1862, s. 6. *Cf.* Cesena Sulphur Co. 1 Ex. D. 428.
[3] Dicey on *Conflict of Laws*, 156.

Act of 1890, which applies only to England and Wales. Of course no such intention animated the founders of the great majority of the companies which trade in the several parts of the United Kingdom, though established elsewhere.

Rights under Treaties.—The rights referred to above have been recognised by treaties with several countries. The treaty with France may be quoted as an example of these conventions. It is dated April 30, 1862, and runs as follows (omitting formal parts):

ART. I.—The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same, throughout the dominions and possessions of the other Power, subject to the sole condition of conforming to the laws of such dominions and possessions.

ART. II.—It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorised previously to the signature of the present Convention, as to those which may subsequently be so constituted and authorised.

ART. III.—The present Convention is concluded without limit as to duration. Either of the high Powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two high Powers, moreover, reserve to themselves the power to introduce into the Convention, by common consent, any modifications which experience may show to be desirable.[1]

Treaties in almost precisely the same words have been made with Belgium (November 13, 1862), Italy (November 26, 1867), Spain (January 29, 1883), Greece (August 4, 1888); there is also a declaration with Germany made on March 27, 1874, which contains the following additional paragraph:

It is agreed that such companies and associations established in either of the two countries shall only be admitted to the exercise of their business or trade in the dominions of the other party if found to be in compliance with the conditions prescribed by the law of that country.

A clause to somewhat similar effect (Clause 16) was inserted in the general commercial treaty with Tunis of 1875.

Procedure.—When foreign companies trading in England are sued in England, the writ is served on the manager at the principal office of the company in England (R.S.C. Order 9, r. 8). This rule applies to commercial companies, but not to an educational congregation.[2] Sometimes foreign companies in their contracts expressly agree that the writ may be served on designated agents in England. Such an agreement is valid, and a writ so served is a legitimate commencement of an action.[3] Foreign companies not

[1] Hertslet's *Complete Collection*, vol. xi., p. 218.

[2] *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q.B.D. 519; *La Sainte Union*, 67 L.T. 703.

[3] *Montgomery* v. *Liebenthal* [1898], 1 Q.B. 487: *Annual Practice*, 1900, 55.

trading in England may have notice of legal proceedings in England affecting them in the same way and in the same circumstances as foreign individuals. In motions to amend the Registers of Patents, Designs, and Trademarks the notices to the persons and companies abroad are given by letter.[1] In actions, notice of writ is served on foreign companies abroad. Notice of writ cannot be served abroad except by leave of the Court, which is only given in the cases specified in the rules of the Supreme Court.[2]

Income Tax payable by Foreign Companies.—With regard to income tax the London agency of a foreign company which earns profits abroad and profits in England is chargeable with income tax upon the whole of the profits earned in England and so much of the profits earned abroad as is paid to English shareholders. If the English shareholders receive dividends from a foreign country directly, without the intervention of some agent in England who deducts income tax, the shareholders themselves must make a return and pay income tax upon the dividends so received. It was held in the case of the *Great Northern Telegraph Company of Copenhagen* (a Danish company), which had marine cables at Aberdeen and Newcastle, and workrooms, with clerks, at London, Newcastle, and Aberdeen, that the company exercised a trade in the United Kingdom and must pay income tax upon its profits.[3]

Winding up.—A company incorporated in a foreign country which has its principal place of business in that country, but which has an office, and has assets in England, may be wound up in England; and the pendency of a foreign liquidation does not affect the jurisdiction of the Court to make an order for winding up[4]; but the liquidation in England is often ancillary to a liquidation in the country in which the foreign company is domiciled. The general principle is to ascertain what is the domicil of the company in liquidation; the Court of the country of domicil is then considered as the principal Court to govern the liquidation, and the other Courts (that of England, for example) act as ancillary as far as they can to the principal liquidation.[5]

The jurisdiction is recognised by a provision for reducing the fees applicable to the winding up of companies in cases where the head office of the company being wound up is situated out of England and the liquidation takes place partly in England and partly elsewhere (Lord Chancellor's Order, June 25, 1892).[6]

[1] *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* [1891], 3 Ch. 451.
[2] R.S.C., Order xi.
[3] *Erichsen* v. *Last*, 8 Q.B.D. 414.
[4] Buckley on Companies, 466.
[5] Sir R. V. Williams in *English, Scottish and Australian Chartered Bank* [1893], 3 Ch. 385.
[6] Palmer's *Company Precedents*, Part II., p. 914.

NON-CHRISTIAN MARRIAGE.

[*Contributed by* Sir Dennis Fitzpatrick, K.C.S.I.]

Introductory.—I propose to discuss a question which is, to a great extent, of a speculative nature, and on which there must be much room for difference of opinion—I mean the question of the treatment to be accorded, by the Courts of a civilised country like England, to a non-Christian marriage entered into in a country where a non-Christian system of marriage prevails, and of the extent to which those Courts can give effect to the legal relations, rights, and duties springing directly or indirectly from such a marriage. I should have preferred that the task of discussing this very difficult subject should have fallen to some person really learned in the departments of law to which it appertains. My own claims to speak on it, such as they are, rest chiefly on the circumstance that in the course of my service in India, and since I have returned to England, I have had several times to assist in discussions on it, arising out of the practical exigencies of administrative or legislative work; and my object will have been accomplished if I succeed in marshalling the various subordinate questions involved in it, and bringing together such materials as I can find available for their solution.

The Meaning of Non-Christian Marriage.—To begin with, I must explain what I mean by "non-Christian marriage"; and in order to do this, it is necessary first to say a few words as to "Christian marriage." English-speaking lawyers use the expression "Christian marriage" to denote a marriage the essential requisites of which are commonly said to be:

(1) that it must be a union between one man and one woman, to the exclusion of all others;

(2) that it must be a union for the joint lives of the parties to it;

and to these it is presumed we should add a further requisite, though one more commonly understood than expressed, namely,

(3) that it must be based on the consent of the parties to it.

There is in England, since the case of *Hyde* v. *Hyde*,[1] what may be called in some sense another criterion for determining whether a marriage is a Christian marriage. In that case Lord Penzance decided that the only marriage with which the present Matrimonial Court can deal is a Christian marriage, and hence if we find that that Court, or a like Court elsewhere in

[1] L.R. 1 P. & D. 130 [1866]; 35 L.J. P & D. 57.

Her Majesty's dominions, has dealt with a marriage of a certain class, or if we can confidently predict that such Court will, if called upon to do so, deal with a marriage of that class, we are in a position to affirm that marriages of that class are Christian marriages.

This expression—"Christian marriage"—has been objected to on various grounds (see, *e.g.*, Laurent's *Droit Civil International*, vol. iv., s. 288), and it must be admitted that it is not altogether an appropriate one. It is, on the one hand, intended to include many marriages which can be called "Christian" only because they conform to a type which we are apt to regard as peculiar to Christianity. Thus it is intended to include marriages contracted before civil functionaries in European countries between persons who are not Christians and without any religious ceremony, certain marriages contracted in India under special enactments passed expressly for persons who are not Christians, marriages like the Japanese marriage which came under consideration in *Brinkley's* case,[1] and almost certainly some Jewish marriages. On the other hand, the expression "Christian marriage" is intended to exclude marriages, say of a polygamous nature, which some Christian community might, without ceasing to be Christian, think fit to sanction among its members in an out-of-the-way part of the world.[2]

But "Christian marriage" is an expression so well established among us that it is convenient to adopt it; and if we adopt it, it is further convenient to use the expression "non-Christian marriage" to denote all sexual unions which can be considered marriages, but which fall short of the Christian standard in any one of the particulars above specified. But this at once starts the question as to what sexual unions can be considered to be marriages, and to this question it would not be easy to give a definite answer. If, however, an attempt were to be made to define marriage with reference to its legal effects, it might not be very wide of the mark to say that it is such a union between the sexes as is recognised by the law or custom of a people, and adopted by it as the basis of the normal or typical family relations established among that people. This would exclude not only mere casual commerce and irregular unions, but also, as will presently be explained, all but the highest forms of polyandrous unions.

Even when limited in this way, non-Christian marriage presents such a vast number of varieties that it would be out of the question for us to discuss them at large; but we may refer to some of the leading varieties, and in doing so it will be convenient to take up in order each of the requisites of Christian marriage, and consider the marriages that fail to comply with it, it being of course understood that many of these marriages fail to comply with more than one of these requisites.

[1] *Brinkley* v. *Att.-Genl.*, 15 P. & D. 76 [1890]; 592 L.J. P. D. & A. 51.

[2] The Mormon marriage dealt with in the *Hyde* case would fall under this head, if it were not that the Mormons are not, as I understand, held to be Christians, and do not consider themselves such (see *Encyclopædia Britannica*: "*Mormons*").

Conditions of Christian Marriage: (i) "**One Man and One Woman.**"—To begin with, a marriage system may fall short of the Christian standard by failing to comply with the first requisite of Christian marriage—namely, that it must be a union between one man and one woman to the exclusion of all others; and this may happen in one or other of two ways—namely, by its admitting of a marriage between one man and several women, or by its admitting of a marriage between one woman and several men.

—— **Polygamous Unions.**—When this happens in the former of these ways, we have what is commonly called the "polygamous marriage." This is the non-Christian marriage which will most engage our attention, and it is to be observed that a man's marriage may be polygamous, though he has, as a matter of fact, only one wife, if it is open to him, during the continuance of his marriage with her, to take another. It is convenient to speak of such a marriage as a "potentially polygamous marriage," using the phrase "actually polygamous marriage" to denote a marriage in which there are actually two or more wives.

Among the Mussulmans of India and many other communities the members of which marry for the proper purposes of marriage, and not mainly in order to employ their wives as labourers, actual polygamy is extremely rare, being, in fact, a luxury of comparatively well-to-do men; but this does not make it much easier to deal with their marriages, for we shall find that, to the Courts in a country like England, the potentially polygamous marriage presents almost as great difficulties as the actually polygamous marriage.

—— **Jewish Marriages.**—Under the head we are now considering there fall certain Jewish marriages. The marriages of the Jews of Morocco and certain other remote countries are still polygamous, and must therefore be reckoned as non-Christian; and if it is true, as I have seen stated in some papers which recently came before me, that the Jews of Spain are at liberty to take a second wife with the consent of the first, it would seem pretty clear that their marriages, too, would have to be placed in the same category. But the Jews in other countries of Western Europe appear for many centuries to have given up polygamy. I have lately seen an opinion from a gentleman, a member of the Jewish community in England, and who, I understand, is in a position to speak with authority on the Jewish Law, in which it is stated that one Gershom, a leading man among the Jews of Mayence in the eleventh century, issued a decree forbidding polygamy, that that decree, though resting mainly on his personal authority, has since been followed in practice in civilised countries (*query*, with the exception of Spain above referred to), and that no rabbi or Jewish minister in these countries would solemnise a polygamous marriage. Assuming this to be so, it would seem reasonable to hold that among the Jews of those countries polygamy has been abolished by long usage, and that, so far as this point is concerned, there is nothing to prevent their marriages ranking as Christian marriages.

—— **Husband Permitted to keep Concubine.**—There is one other matter to which it is necessary to advert in connection with the polygamous marriage. There may be marriage systems which, though they restrict a man to one wife, allow him to cohabit at the same time with other women, standing on a footing lower than that of a wife.[1] We shall see that in *D'Aguilar* v. *D'Aguilar* this was alleged to be the case with the present Jewish law of marriage, and we shall also see how Lord Stowell was disposed to deal with the matter. It is enough to say here that it is difficult to suppose that our Courts nowadays would treat a marriage involving this peculiarity as a Christian marriage. It would be difficult to hold that the liberty to cohabit with other women in this way is a mere non-essential incident of the marriage, like, *e.g.*, the right to administer chastisement to the wife, or to place her under restraint of some sort, which a Court dealing with a foreign marriage could refuse to recognise, though it was an incident of such marriage in the foreign country. To hold a man, who had entered into a marriage of the sort here referred to, guilty of a matrimonial offence in keeping a concubine, would be to substantially alter the marriage.

—— **Polyandria.**—To speak next of the non-Christian marriage which falls short of the Christian standard by reason of its being a union between one woman and two or more men, it must be remembered that there are many varieties of polyandria, and that the two varieties of it most commonly referred to, differ widely from one another.

The first of these is the lowest form of polyandria—the "indefinite polyandria," as it is sometimes called—which allows a woman to consort with any men of the tribe she pleases, and to change them from time to time.[2] This form of polyandria falls altogether outside our attempted definition of marriage, because, where it prevails, the law does not recognise the union of any particular man with the woman, much less make it the basis of family relations; but as it will help us further on to know something about it, a few words regarding it may not be out of place. Polyandria in this form prevails very extensively in Southern India, both within and beyond Her Majesty's dominions. It has given rise to family systems so elaborate and complicated that the Madras Law Reports teem with cases relating to them, but those systems are based exclusively on kinship through women. As a rule—to which there seem to be few, if any, exceptions—the only facts that the law takes cognisance of in determining a question of kinship are the births of certain children from the wombs of certain women. It does not trouble itself to consider how those children came to be conceived. For aught it cares, the mother may have become pregnant as the result of intercourse with a "casual visitor," as we find him called in the discussions

[1] The Mohammedan Law permits a man to cohabit with any number of his female slaves in addition to his wives, who are limited in number to four.

[2] I ought to explain that what little knowledge I have of this sort of polyandria is derived merely from books and papers.

on the subject—indeed, if nature admitted of such a thing, they might have become, like the mares in Virgil, "Sine ullis conjugiis vento gravidæ." The whole thing seems so utterly topsy-turvy from our point of view that, as I found the other day when I had a question of succession in a polyandrous family of high rank before me, it requires a considerable mental effort on our part to think it out. In like manner people living under such a system find some difficulty in realising our idea of marriage. This is strikingly illustrated by recent events in Madras. It had for a long time been becoming more and more the practice, among some of the polyandrous tribes there, for a woman to form a union for life with one man exclusively. She would, on entering into such a union, go and settle in the man's house, and he would—at least, so far as concerned personal relations—assume the *de facto* position of a husband to her and of a father to her children. Such unions were, from a social point of view, treated with much respect among the tribes in question, and are said to have almost completely superseded polyandria among them; but the customary law of these people did not recognise such unions and regarded the position as still potentially polyandrous. The result was that our Courts found themselves unable to treat these unions as marriages, and the Madras Legislature had to come to the rescue. After considerable discussion it passed an Act called the Malabar Marriage Act, 1896,[1] which in effect provides that such unions shall, on being registered according to a certain procedure, be deemed to be marriages, and then goes on to fix the legal relations that are to arise from them.

—— **Fraternal Polyandria.**—The other variety of polyandria to which we have to refer is what Herbert Spencer calls "fraternal polyandria." The only union of a woman with several men permitted by it is a union between a woman and two or more men who are brothers. It prevails in some parts of the Himalayas, as, for example, among certain classes in the Kulu subdivision of the Kangra district of the Punjab. I cannot find that any case of it has been considered by the Punjab Chief Court, but it is treated by the inferior Courts as marriage, and I venture to think it is rightly so treated, for the union is a permanent one, recognised by the customary law of these people, and made by it the foundation of family relations. The only hesitation there has been is as regards the question of paternity. The impression left on my mind by three or four cases that came before me when I had charge of the subdivision for a very brief period long ago was that, as in some other similar communities, the brothers were regarded as so completely joint in all respects that the wife's child could, without inconvenience, be treated, and was treated, as the child of them all; but a friend of mine who came after me there many years later, and is familiar

[1] The member of the Legislative Council who took charge of the Bill was himself a member of a polyandrous community, and his speeches in Council show him to have been a man of considerable learning, and of great judgment and tact in dealing with a very difficult problem.

with the system, tells me that that is not so, but that the paternity is always fixed on one of them. Formerly, he says, it was the practice to fix it on the man who was actually the father, or whom, in cases of doubt, the woman declared to be the father; but of late the people, having seen more of the outer world, have begun to be somewhat ashamed of polyandria, and endeavour to make out that the woman is the wife only of the eldest brother, and that the others have nothing whatever to do with her. As a result of this, he tells me, the eldest brother is coming to be regarded as in all cases the father.

(ii) "**For Life.**"—Let us now turn to the second requisite of Christian marriage—namely, that it must be a union for life—and consider what marriages may have to be deemed non-Christian by reason of their not complying with it.

—— **Marriage for a Fixed Period.**—There is, in the first place, the union for a fixed period, like that which is permitted to Mussulmans of the Shia sect. The lawyers of that sect—speaking, I fancy, not with reference to anything likely to occur in practice, but merely with the casuist's anxiety to exhaust all possibilities—tell us that such a union may lawfully be agreed on for one day, or even for a part of a day, as, for example, until the setting of the sun. Unions of this class would perhaps in some cases not amount to marriage in the sense in which we are using the word; but when they do, they would certainly not be Christian marriages. Next there is the more difficult case of the marriage which, according to the intention of the parties as embodied in the contract creating it, is one for life, but which is liable to be dissolved in some way during the lives of the parties to it.

—— **Dissolubility.**—It need not be said that the circumstance that a marriage is, by the law under which it is contracted, dissoluble by the sentence of a Court,[1] does not prevent its being a Christian marriage. The true view of dissolution by sentence of a Court seems to be that taken in the case of *Warrender* v. *Warrender—viz.*, that it is simply a species of relief, provided to meet an extraordinary state of things not contemplated by the parties at the time of the marriage, but which subsequently supervenes—a species of relief which a Court having jurisdiction to deal with a foreign marriage would give or withhold according to its own law, and without regard to the foreign law under which the marriage was contracted. If this is so, it is clear that the circumstance of a marriage being or not being, by the law under which it is contracted, open to dissolution by judicial sentence is not to be regarded as part and parcel of the marriage contract, or as in any way affecting the substance of that contract.

—— **In Pais.**—But can we take a similar view where, by the law under which the marriage is contracted, it is, to use a phrase of Lord Brougham's,

[1] It seems unnecessary for our purpose to speak of divorce by an Act of the Legislature.

"dissoluble *in pais*"—that is to say, dissoluble by the mere act of one or both parties without the sentence of a Court of Justice?

It might, perhaps, be argued that we can do so if the dissolution *in pais* is permitted only on certain definite grounds, the existence of which can be subsequently called in question in a Court of Justice. It might possibly be suggested that the dissolution here is still a mere remedy to meet special cases of hardship or miscarriage not contemplated at the time of the marriage, and that the only difference is that that remedy, instead of being applied by the Courts, can, in the country of the marriage, be applied by the party, subject to the control of the Courts. But it seems almost impossible to take any similar view when divorce *in pais* is, by the law under which the marriage is contracted, allowed at the mere pleasure of a party. The intention of the parties at the time of the marriage to live together till death do them part may be as clear and fixed as you please, and the powers of language may be exhausted in expressing that intention, but what becomes of all this if the law adds on a proviso that one of them may at pleasure rescind the contract? It would be difficult to argue that that does not affect the substance of the contract, and exclude the marriage from the Christian category.

Divorce *in pais* being entirely contrary to modern ideas, a question of this sort could scarcely arise in respect of any marriage contracted in a civilised country, except, perhaps, in the case of a Jewish marriage contracted somewhere abroad; and as regards marriages in uncivilised or semi-civilised countries, it would, I suspect, commonly be found that when the Christian character of a marriage was open to question on the ground of its being dissoluble *in pais*, it would, as is the case with the Mohammedan marriage, be found to be clearly non-Christian on some other ground, and so there would be no need to trouble ourselves about the dissolubility.

—— **Malabar and Jewish Marriages.**—But questions of the sort we are now considering have arisen in America, and such a question might present itself if one of the new Malabar marriages referred to above (p. 363) were to come before a Court in England, for, while such marriages conform in other respects to the Christian standard, those who framed the Malabar Marriage Act were compelled by circumstances to make them dissoluble at the mere will of either party by a notice served on the other through a Court exercising no control, but acting simply as an official channel. And then there are the Jewish marriages. It seems clear that, according to the Jewish Law, a Jew may divorce his wife by delivering to her a bill of divorce with certain formalities before some sort of Jewish tribunal.[1] It is to be gathered from an article in the twenty-third volume of the *Law Magazine* (4th Series), p. 317, that that tribunal exercises

[1] See Hammick (*The Marriage Laws of England*), p. 165 and app. vii., where a statement of the Jewish Law by the Rev. Dr. Herman Adler, Chief Rabbi, is given. See also the judgment in *Lindo* v. *Belisario* (1 Hagg. Consist. 216), where the dissolubility of Jewish

some control over the right of divorce, and it is stated in that article that nowadays a Jew cannot divorce his wife, without her consent, except for "just cause," but what would be deemed to be "just cause' is not explained. It would, however, doubtless be held that a Jewish marriage could not be dissolved in any such way in England;[1] and, as a Jewish marriage celebrated in England would thus be entered into under a law permitting no divorce except by the sentence of a Court, there would seem to be no ground for suggesting that, so far as this point is concerned, such a marriage would be other than a Christian marriage. But there remains the case of a Jewish marriage contracted in a country the laws of which recognise the Jewish divorce *in pais*, and on this it would be difficult to offer any opinion without having full information as to the laws and customs of the modern Jews. It is stated in the article in the *Law Magazine* above referred to that a divorce is never allowed by the Jewish tribunal until a decree has been obtained through the ordinary legal channels. If this means that no bill of divorce is ever allowed at the present day until the marriage has been dissolved by the sentence of the local Civil Court, there is an end of the whole question, for the bill of divorce would thus be reduced to a mere religious ceremony, superadded in order to satisfy the consciences of the parties, and would in no way concern us.

We shall have to revert to this matter of dissolubility *in pais* later on when we come to consider the cases before the Divorce Court, but it may be said at once that it would be difficult to lay down the boundary between Christian and non-Christian marriages at this part of its course with any degree of confidence.[2]

marriages by bill of divorce is several times referred to. See further *Ganer* v. *Lady Lanesborough* (1 Peake 25), *Moss* v. *Smith* (1 Man. and Grang. 228).

[1] It might almost seem, from the way in which Lord Stowell refers to the Jewish divorce in *Lindo* v. *Belisario* (1 Hagg. Consist. 216), that he would possibly have been prepared to recognise a divorce of that sort effected in England, but such divorces were only incidentally referred to there, and he was in no way called upon to warn people that he would not recognise them. In *Moss* v. *Smith* (1 Man. and Grang. 228 [1840]), which was an action of *assumpsit* by a Jewish woman who alleged that she had been divorced in England, the question, though raised, was not decided. But in his remarks in the *Warrender* case (2 Cl. & F. at pp. 531-2), Lord Brougham treats the suggestion that an English Court would recognise a divorce *in pais* effected in England as absurd.

[2] I have not yet looked into the American cases, but it would seem from Bishop's *Marriage and Divorce* (vol. i., ss. 306-8) that they are somewhat conflicting as to the effect which dissolubility at pleasure without judicial sentence should be considered to have upon a marriage when it comes for consideration before the Courts of a civilised State. The peculiar view taken of such matters by the Christian Church will be referred to hereafter; but it may be here mentioned that where a marriage contract between Jews or other non-Christians contained an express stipulation that the husband might divorce the wife at pleasure, that was regarded, according to the "better opinion" of the canonists, as so completely inconsistent with the idea of marriage that the marriage was held void.

(iii) **Consent.**—There remains the third essential of a Christian marriage—*viz.*, that it must be based on the consent of the parties to it, and it will be found to be wanting in large classes of marriages in India, and doubtless elsewhere. I refer to those cases in which the parents or guardians of a boy below the age at which anything that could properly be called consent is possible, and those of a girl in a similar predicament, conclude a marriage—that is to say, a true marriage, as distinguished from a mere betrothal—between them. The want of the consent of the parties is of course supplied if, as usually happens, the marriage is consummated later on; but meantime the marriage is, in the eyes of the law under which it is concluded, a true marriage, and, as it is not based on the consent of the parties to it, it is a non-Christian marriage.

This gave rise some years ago to a discussion with the heads of the various Christian denominations in India, which will be referred to later on when we come to speak of the attitude of the Christian Church toward non-Christian marriage.

A Marriage once Non-Christian always Non-Christian.—As regards non-Christian marriage generally, there is a further point which seems worth mentioning—namely, that the character of a marriage as Christian or non-Christian must be determined by looking at it as it stood at the time it was contracted, according to the law under which it was contracted. In other words, once a non-Christian marriage, always and everywhere a non-Christian marriage. Thus, if the parties to a potentially polygamous marriage were to come into England, the Courts there would not say: "The husband has only one wife, and if we recognise his union with her as a marriage, he cannot, during the continuance of such marriage with her, take a second wife in England. Hence we may treat this union as monogamous and Christian." They would, on the contrary, hold the marriage to be still polygamous and non-Christian. Similarly, where persons who are not Christians contract a non-Christian marriage, and during the continuance of that marriage are converted to Christianity, the character of their marriage is unaffected by the conversion, and remains non-Christian. This was held by a full Bench of the Madras High Court,[1] and a similar view was taken by the Allahabad High Court.[2] The Calcutta High Court[3] in a case before it acted as if it took an opposite view, but the parties in that case did not appear by counsel, and the point was not raised.

Having thus endeavoured to distinguish as far as possible between Christian and non-Christian marriage, and having described the leading varieties of the latter, it seems necessary in the next place to make one or two observations on the nature of the task before us.

Recognition of Non-Christian Marriages.—It is well known that in extensive portions of Her Majesty's dominions abroad, and in some places where

[1] I.L.R. 17 Mad. 235 [1893]. [2] 2 N.W.P.H.C. Rep. 370.
[3] I.L.R. 18 Cal. 252 [1891].

she exercises foreign jurisdiction, the systems of marriage prevailing are of some non-Christian type, and that our Courts there have to deal with marriages contracted under these systems according to the law of the parties, except in so far as any portion of that law has been found to be so repugnant to our ideas as to have been amended by some legislative authority. In British India in particular our Courts are, except as just mentioned, bound by the terms of certain Acts of Parliament, or certain local Acts passed under powers delegated by Parliament, to administer the Hindoo Law to Hindoos, and the Mohammedan law to Mohammedans, in matters connected with marriage and legitimacy; and I think it may be said that the English judges who preside in these Courts, and the very learned persons who sit in Downing Street to hear appeals from their decisions, contrive to administer justice in such cases without doing any great violence either to their own feelings or to the feelings of the communities concerned. But with the treatment of the non-Christian marriage by British Courts under such circumstances we are not directly concerned here. What we have to deal with here, as stated above, is the treatment of the non-Christian marriage, and the legal relations, rights, and duties springing directly or indirectly from it, in cases where such marriage has been contracted in some foreign country or in some part of Her Majesty's dominions abroad where such marriages are legal, and comes in some way in question before the Courts in England or in some part of Her Majesty's dominions similarly situated. The question is one of private international law, using the phrase in its widest sense.[1]

Its Difficulties.—Now a moment's reflection will show the difficulty of dealing with a non-Christian marriage under such circumstances. As has been over and over again observed by learned persons of all sorts, the Christian marriage is to such an extent the same everywhere that when a Christian marriage contracted (say) in country A comes under consideration in country B, the Courts of country B can, without being subjected to any undue strain, deal with it very much as they would deal with one of their own marriages, and if only certain limitations of jurisdiction have been observed, the Courts of country A can as a rule accept what they do. A set of principles has come into existence to regulate such matters, and these principles are year by year getting better settled and commanding a wider assent.

But if a non-Christian marriage comes before the Court of a country like England, the position is very far from being the same. The various sorts of non-Christian marriage are too different from Christian marriage to admit of their being treated in the way just referred to—at least, when the personal relations of the parties to the marriage are in question. If those relations were to be dealt with, some new set of principles would have to be evolved

[1] As distinguished from the narrower, and, for certain purposes, more proper sense of a body of definite rules already recognised between the Courts of civilised States. It is to private international law in this latter sense Professor Dicey confines himself in his *Conflict of Laws*, and thus non-Christian marriage falls outside the scope of that truly admirable work.

for dealing with them, and about this there would be great difficulties. On the one hand, some of those relations are apt to be of a nature so repugnant to the ideas prevalent in a fully civilised country that it would be beyond the range of practical politics to require the Courts of such a country to accept them *en masse*, or subject only to certain limited modifications, as our Courts in India do. On the other hand, to modify those relations to any considerable extent would be to saddle the parties with a marriage of a sort different from that which they had contracted. It may be said at once that it seems almost hopeless to think of the Courts of a country like England dealing with the personal relations of the parties to a non-Christian marriage, except, perhaps, in regard to some particular points; and one thing above all might be easily anticipated—namely, that a piece of machinery like the English Matrimonial Court, constructed specially for the purpose of dealing with the personal relations of the parties to a Christian marriage, would be found altogether unsuitable for handling non-Christian marriages. It must, however, be remembered that a marriage gives rise directly or indirectly to many other legal consequences besides the personal relations between the parties, and to them different considerations may apply.

Proposed Plan of Treatment.—I now propose, in the first place, to refer to such English cases as have any bearing on our subject. We shall find that they cover only certain portions of the ground, and that as to the question generally we shall have to seek such light as we can get elsewhere. We shall thus be led to refer next to the views taken from time to time of non-Christian marriage by the Christian Church, and, after that, to the general principles of private international law, to such observations on the subject of non-Christian marriage as are to be found in the works of eminent writers on that law, and to some decisions of the Courts of other countries. Finally, it may be possible to suggest some conclusions—at least, in a tentative and provisional way.

Jewish Marriages before Lord Stowell.—The earliest cases calling for notice are those of the Jewish marriages which came before Lord Stowell in the Ecclesiastical Court at the close of the last century.[1] They cannot be expected to afford us anything in the way of authority, properly so called, on the main question before us, and there may be some things in them which would no longer hold good, or which, from the point of view since reached, would be open to criticism; but they form part of the history of our question, and they are interesting and instructive, if only as showing the bent of Lord Stowell's mind in dealing with such matters. The marriages dealt with in these cases were English marriages, and, having regard to what has been said above (pp. 360 and 361), it would seem pretty certain that they were

[1] There were four or five of these cases, but the only two to which we need particularly refer are *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Eccles. 773 [1794]; and *Lindo* v. *Belisario*, 1 Hagg. Consist. 216 [1795].

marriages of a sort that would nowadays be classed as Christian marriages; but Lord Stowell, as may be gathered from these cases and from certain well-known passages in his judgments in *Ruding* v. *Smith* and *The Indian Chief*, seems to have regarded Jews in England almost as if they still retained there something of the quasi-exterritorial status which was ascribed to them at a very early period of our legal history, or at all events as if they had claims of a very peculiar sort to have their personal law administered to them,[1] and he appears at times to have been inclined to treat their marriages almost as if they were foreign marriages of a nondescript class.

Lord Stowell's Views of the Jurisdiction.—The first point to be noted in connection with the cases now to be considered, is that as to the class of marriages in respect of which the Ecclesiastical Court could exercise jurisdiction. It is impossible to read the judgment of the Judicial Committee of the Privy Council delivered by Dr. Lushington in the case of *Ardaseer Cursitju* v. *Perozeley*[2] without receiving the impression that he and his colleagues felt some doubt as to whether Lord Stowell was right in dealing in any way with Jewish marriages in the Ecclesiastical Court; but Lord Stowell himself was not troubled by any doubt of the particular nature that

[1] Sir Erskine Perry, in his judgment in the case of *The Khojas and Memons* (*Oriental Cases*, p. 127), actually formulated a very far-reaching claim of certain non-Christian people to have their personal law administered to them, and he considered that he had for it the support of Lord Stowell, but in this he perhaps went too far. Lord Stowell never put the dots on the "i's" and the crosses on the "t's," as Sir E. Perry does. The passage (which seems worth quoting), after referring to the well-known remarks of Lord Stowell in *The Indian Chief*, proceeds as follows:—"By the comity of nations, therefore, as existing between princes of Christian and non-Christian faith, the *lex loci* to its whole extent is held not to apply to Europeans placing themselves under the government of the latter. But if this is the case as regards Christian aliens in a foreign State, there can be no doubt that a similar comity requires a similar rule to be observed when a Mussulman or Hindoo seeks a domicile in a Christian country. How far the peculiar laws of such non-Christian aliens would be recognised, it may not be very easy, nor is it necessary, to define beforehand. . . . But on very many questions, such as marriage, divorce, succession, and possibly adoption, there seems no reason to doubt that the proper law to be referred to for the decision of any controversy would not be the law of the Christian community, but the law or usage of the peculiar non-Christian class. That this was the opinion of the great jurist whom I last cited is not left a matter of doubt, for he has stated it expressly in many of his judgments with respect both to Jews and that other singular Oriental race, the gypsies." See 3 Rol. 32; *Ruding* v. *Smith*, 2 Hagg. Consist. 384; *Lindo* v. *Belisario*, 1 Hagg. 216.—Since the above was in type my attention has been drawn to the case of *De Wilton* v. *Montefiore* (L.J., July 21, 1900), and the following passage from the judgment of Stirling J. seems very much in point here. It must be remembered that he was speaking of Jews who were British subjects domiciled in England. "*Lindo* v. *Belisario*," he said, "was the first case in which the validity of a Jewish marriage was considered by an Ecclesiastical Court. In dealing with it Lord Stowell used language which would not have been inappropriate if the question before him had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only, and the case was no authority for the proposition that the capacity of members of the Jewish faith to contract marriage was regulated by their own law and not by the law of this country."

[2] 6 Moo. I.A. 348 [1856].

occurred to them. The first of the cases that came before him was that of *D'Aguilar* v. *D'Aguilar*. It was a cause of separation instituted by a wife for cruelty and adultery, and he felt no hesitation about entertaining it. He observed that the marriages of Jews were expressly protected by the Marriage Act,[1] and that persons of that persuasion were as much entitled to the justice of the country as any others. "I take," he said, "the doctrine to be that all persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty."

The next case was that of *Lindo* v. *Belisario*, which was a jactitation suit brought by a Jewess against a Jew, charging him with having boasted of a marriage with her which was not good or valid in law.

Lord Stowell said that the case came before him by direction of the Lord Chancellor, otherwise he would have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in the particular case. In ordinary cases, he observed, the Court has "the satisfaction of knowing that the principles which regulate English marriages are such as are also generally applicable to marriages of foreign Christian countries, the marriage law of Europe being founded on the same general principles, and having for its basis the ancient Canon Law, so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis." But in this case he was called upon to deal with "a question of marriage of a very different kind, between persons governed by a peculiar law of their own, and administered to a certain degree by a jurisdiction established among themselves." He doubted whether the question would not have been better referred to that tribunal. "I cannot," he said, "but be sensible that in applying the general principles of the law of marriage to this case I may be adopting rules that are not duly founded and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish Law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles."

Now what first strikes one on reading this is the great freedom Lord Stowell assumed in dealing with the question of jurisdiction. The idea of laying down for the jurisdiction of the Ecclesiastical Court any such sharply marked boundary line as has since been laid down for the jurisdiction of the Divorce Court does not seem to have suggested itself to him. It does not seem to have occurred to him that, because marriages between Christians were the marriages with which his Court was originally intended to deal, he should, in order to determine the limits of his jurisdiction, ascertain by analysis the essentials of marriage between Christians, and

[1] But the Marriage Acts apparently refer only to the form of celebration. So held in the case of *De Wilton* v. *Montefiore* referred to in footnote on p. 370.

refuse to deal with any marriage that did not conform to these essentials. He seems to have dealt with the question of jurisdiction, as a physician would say, *pro re natâ*. It is true, as just observed, that the marriages with which he actually dealt were all marriages of a sort which it is pretty safe to say would nowadays be deemed to be Christian marriages, and be dealt with by the Divorce Court. But there is one passage in his judgment in *Lindo* v. *Belisario* which gives us some ground for suspecting that he did not regard his jurisdiction as necessarily limited to marriages of that sort. In that case he had to decide whether certain ceremonies which had been gone through by the parties were, according to the Jewish Law, sufficient to constitute a marriage, and for this purpose he proceeded to explain what he conceived marriage to be.

After referring to the opinions which have divided the world as to the nature of marriage—some regarding it as a mere civil contract, others as a sacred religious and spiritual contract—and observing that neither view was perfectly accurate, he continues as follows :[1]

"It [marriage] is a contract according to the law of nature, antecedent to civil institution, and which may take place, to all intents and purposes, whenever two persons of different sexes engage by mutual contracts to live together. Our first parents lived not in political society, but as individuals without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce, nor would it be so even in the law of nature. A mere casual commerce without the intention of cohabitation and bringing up of children would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children and for such lasting cohabitation, that in a state of nature would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce ; but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature is adopted as a contract of the greatest importance in civil institutions." Rights of property, he goes on to observe, spring from it, and so on. Now a marriage for any period short of life is, as already observed (p. 364), clearly a non-Christian marriage, and one with which the present Divorce Court would not deal ; and if we are to understand from this passage that Lord Stowell considered it to be an open question whether the Ecclesiastical Court could deal with such a marriage, it is clear that he was very

[1] At p. 230.

far from having formed to himself any such conception of the limits of his jurisdiction as would have confined it to what we nowadays call Christian marriage. It must, however, be remembered that this passage, in so far as it refers to temporary marriages, is a mere *obiter dictum*, inasmuch as the marriage he then had under consideration was not one for a fixed period only.

There is another point to be noted as an illustration of Lord Stowell's free treatment of the question of jurisdiction. He does not seem to have taken the view which the Divorce Court now takes, that the matrimonial jurisdiction in all its branches is one indivisible thing which must be applicable as a whole, or not at all, to marriages of a given description. On the contrary, judging from what he said in the two cases above referred to, he would appear to have considered that one branch of his jurisdiction might well be applicable to marriages of a given class, and another not. He treats the question, to a great extent, as one of convenience, and in particular as one of the effectiveness of the jurisdiction under the particular circumstances.

His Views as to the Substantive Law Applicable.—As to the principles of law which he would apply in a case in which he exercised jurisdiction, we have already seen (p. 371) what he said in *Lindo* v. *Belisario*, but there is a further point which comes out in the *D'Aguilar* case, and which seems to call for notice. In that case it seems to have been urged, in answer to the charge of adultery brought by the wife against the husband, that he was permitted by the Jewish Law to keep concubines in addition to his wife. Now a marriage involving such an incident as this would seem, as submitted above (p. 362), to be non-Christian, and as such excluded from the jurisdiction of the present Matrimonial Court. But let us see how Lord Stowell deals with the point. He says:[1] "Next as to the adultery. It has been suggested that the Jewish regulations allow concubines. By the Mosaic Law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian Court to which they have resorted, and if it could be noticed, it ought to have been specially pleaded, but I think it could not." That is to say, Lord Stowell thought that the Court should refuse to listen to such a plea, or in other words that it should reform the marriage by pruning off from it the objectionable incident in question, and then deal with it as so reformed. This, as already observed (p. 368-9), seems to be a somewhat questionable view. It almost looks like a first step towards the strange view taken (as we shall see further on) by the Canon Law, that when a polygamist has several wives, his marriage with the first wife should be deemed valid, but should be treated as binding on him as a monogamous marriage, and consequently as making his subsequent marriages void *ab initio*. Here again, however, it must be remembered that what we have to deal with is a mere *obiter dictum*.

[1] At p. 785.

What the eventual result would have been if Lord Stowell had had further opportunities of working all these matters out, it is hard to say. It is possible that he might ultimately, under the pressure of circumstances, have arrived at conclusions not very different from those arrived at, *per saltum*, by Lord Penzance in the *Hyde* case, but it seems more probable that he would have gone on to attempt to deal with some sorts of non-Christian marriage, and if he had done so, we might have been ultimately landed in perplexing complications.

I have dwelt on these cases at this length because all that fell from Lord Stowell in them—and, I may add, what was said by that other very learned lawyer, Sir E. Perry, in the passage cited in the footnote on p. 370—whether it would be right or whether it would be wrong in certain respects, and in particular as applied to the matrimonial jurisdiction, displays a breadth and liberality of view, and a sympathy with, and desire to make the best of, institutions widely differing from our own, which it will be desirable to keep in sight when we come to consider the treatment of the non-Christian marriage outside the limits of that jurisdiction.

Dicta of Lord Brougham on Non-Christian Marriage in "Warrender v. Warrender."—We have next to refer to a well-known passage in Lord Brougham's judgment in *Warrender* v. *Warrender*[1] which is sometimes cited in favour of what may be called an extreme view on the question we are considering. In that passage[2] Lord Brougham, after some observations to the effect that when a foreign marriage is alleged to have been contracted in a foreign country, the law of that country must be referred to for the purpose of ascertaining whether it really amounts to a valid marriage, proceeded as follows:—

"But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties—that is, the existence of the contract, and its construction. *If, indeed, there go two things under one and the same name in different countries—if that which is called a marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptation in the country where the obligation was contracted.* But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing—a different status from Turkish or other marriages among infidel nations—*because we clearly never should recognise the plurality of wives and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate.* This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore all that the Courts of our country have to determine is whether

[1] 2 Cl. and F. 488. [2] pp. 531-2.

or not the thing called marriage—that known relation of persons, that relation which those Courts are acquainted with and know how to deal with—has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had, the relation has been constituted, and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

Now there has at times been a tendency to give to these remarks, in so far as they bear on non-Christian marriage, an importance greater, it is submitted, than they really deserve. Anything deliberately laid down by so great a man as Lord Brougham on a matter of this kind would be worthy of profound attention, but he was apt to be somewhat discursive at times; ideas presented themselves to his mind with a rapidity which was truly phenomenal, and he was occasionally given to pouring them forth without stopping to put them into shape. We must, therefore, be careful not to lay too much stress on his *obiter dicta*—and whatever Lord Brougham said here about non-Christian marriage was in the most absolute sense *obiter dictum*. He had before him no question about a non-Christian marriage. He was dealing with a Christian marriage celebrated in England between parties domiciled in Scotland, and which had been dissolved by a Scotch Court. What he was arguing was that the Christian marriage was everywhere so much the same thing that when a Court came to deal with a foreign Christian marriage, it could treat it pretty much as it would treat one of its own marriages. He referred to the non-Christian marriage merely for the purpose of contrasting it in this respect with the Christian marriage, and thus bringing out the position of the latter into stronger relief; and referring to it in this way, a man like him—or, indeed, a man of greater precision—would scarcely feel bound to think out in all its bearings the complicated question of the proper treatment of it by our Courts.

As to what really these utterances of his regarding the non-Christian marriage are to be taken to mean there is room for considerable doubt They have sometimes been referred to in support of the view that no Court in a civilised Christian country can recognise any marriage except a Christian marriage, and that such a Court must treat every other marriage as a mere nullity, under whatever circumstances and for whatever purposes it may present itself for consideration; but it is perfectly clear from the first of the two passages we have italicised above that Lord Brougham did not mean to assert that. It may with more plausibility be suggested that though he did not mean to lay this down in respect to non-Christian marriages generally, he did mean to lay it down in the second passage italicised, in regard to such non-Christian marriages as might be deemed to be polygamous, including those only potentially polygamous. But it is very hard to say what opinion exactly Lord Brougham meant to express in this latter passage, or, indeed, whether he had formed in his own mind any opinion definite

enough to help us. It may be that all he meant to say was that we could not treat a second polygamous marriage as good, standing the first, and that he would have been prepared, like the Christian Church, to treat the first polygamous marriage as good, but as binding the man to monogamy. There is a passage a little lower down which goes to support, to some extent, this view of his meaning; but if that was his view, it is clearly one which we could not accept.[1]

Further, whether his observations are to be taken as applying to a first first polygamous marriage or only subsequent one standing the first, the question arises—What exactly did he mean by saying that "we never should *recognise* the plurality of wives," or, to put it in the more usual form, that we should never recognise a polygamous marriage?

"Recognising" a Polygamous Marriage.—Now what is ordinarily meant when it is said that a particular Court cannot "recognise" a certain marriage, which it is admitted has, as a matter of fact, been contracted, is simply this, that that Court cannot give effect to, or do away with, or otherwise deal with, some or all of the legal relations, rights, and duties springing directly or indirectly from that marriage, by virtue of the law under which it has been contracted; and if Lord Brougham merely meant that he could not in this sense "recognise" a polygamous marriage for the purposes of a case like that before him, and on which his attention would be naturally fixed—a case dealing with the personal relations between the parties to the marriage—that would be no more than was subsequently decided, so far as the English Divorce Court was concerned, in the *Hyde* case. But it must be remembered that one of our Courts might be asked to "recognise" such a marriage for any one of a number of other purposes, as, *e.g.*, if a man of a polygamous race, domiciled and married in his own country, were to die there leaving two wives, and children by both, and these children were to institute proceedings here to recover the share legally due to them of some money left by their father in the hands of an agent here. Now had Lord Brougham thought out all this, and did he mean deliberately to say that for the purpose of the case just put, and of all other cases that could be put, our Courts should refuse to "recognise" a polygamous marriage? I must say that, having regard to the circumstances, this seems extremely unlikely; and it may be added that, if he had thought the whole position out in such detail, he would probably, *more suo*, have given us the benefit of his reflections on it at length. It is a relief to turn from such matters of speculation to the case of *Hyde* v. *Hyde*, where we shall find ourselves on firmer ground.

Mormon and Christian Marriages—The "Hyde" Case.—The facts of the *Hyde*[2] case, so far as they are material for our purpose, can be stated in a few words. It was a petition by a husband for a dissolution of marriage on the ground of adultery. The marriage was one celebrated between

[1] Westlake's *Private International Law*, 1st ed., s. 347.
[2] L R. 1 P. & D. 130 [1866]; 35 L.J. P. & D. 57.

Mormons in Utah, where polygamy prevailed by law and custom, but the husband had married no wife but the one—in short, the marriage was what we have called a potentially polygamous marriage, and that being so, the Judge (Lord Penzance) held that he had no jurisdiction to grant the relief. In his judgment he referred to the fact that he had "expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered 'husband and wife' in the sense in which these words must be interpreted in the Divorce Act." "Further reflection," he says, "has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions."

"It is obvious," he says lower down, "that the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created." Having then referred to several of the special remedies provided by the Divorce Act, he truly observes that "if these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not defining them."

Further on he says, referring to the above: "This is hardly denied in argument; but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this Court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void." But any attempt to do this would, as he shows by certain illustrations he gives, lead to manifest absurdities and inconsistencies, and he accordingly rejects the suggestion. The particular point he decided was that he, sitting in the Matrimonial Court, had no jurisdiction to dissolve a marriage which was even potentially polygamous.

Grounds of the Decision.—But he based his decision on the broad ground that the Matrimonial Court, with its peculiar system of relief and its peculiar principles of action, is a special piece of machinery erected for the purpose of dealing only with Christian marriage, or, as he otherwise terms it, "marriage as understood in Christendom," and that it was not competent to deal with any other sort of marriage.

Christian Marriage—What?—As to what would be deemed to be Christian marriage for this purpose, he defined it to be "the voluntary union for life of one man and one woman to the exclusion of all others." That this definition would exclude, besides the polygamous and polyandrous marriage, a marriage allowing a man only one wife, but permitting him to consort with other women standing on a footing lower than that of a wife, and a marriage for a fixed period, seems pretty clear from what has been already said (pp. 362 and 368); but on the question discussed above (pp. 364-5) as to whether,

in any case, a marriage dissoluble by the mere act of one or both the parties to it, without the sentence of a Court, would be a Christian marriage, the judgment gives us no help. It may, however, be noted that in the subsequent case of *Brinkley* v. *Attorney-General*,[1] in which an application was made under the Legitimacy Declaration Act for a declaration that a Japanese marriage was valid, though it was held necessary for the purposes of such an application to show that the marriage was a Christian marriage, no attempt seems to have been made to ascertain whether—and if so, in what manner—marriages of the sort in question were dissoluble. The application was allowed to pass by the Attorney-General, and was granted by the Court simply on its being proved that the marriage was monogamous. Another observation which suggests itself in regard to this matter of dissolubility by act of parties is that if the Matrimonial Court were to regard a marriage dissoluble in this way as a Christian marriage, and proceed to deal with it as such, there would at least be no danger of this giving rise to anomalies and practical difficulties, such as Lord Penzance shows would arise from its attempting to deal with a polygamous marriage. As already observed (p. 364-5), there could apparently be no dissolution by mere act of parties in England, and if such a dissolution had taken place in the country of the marriage and the Court were prepared to recognise it as putting an end to the marriage,[2] the result would be just the same as when it recognises a divorce by sentence of a foreign Court. If, again, the marriage was admitted to be still subsisting, it would not seem that the Court's dealing with it would give rise to any particular anomalies or practical difficulties. But all this touches only one of the elements to be taken into consideration in determining whether such a marriage is a Christian marriage.

Jurisdiction of Matrimonial Court over Mutual Personal Rights of Parties—Whether Exclusive.—It does not, of course, follow because there exists in a country a special Court, like the English Divorce Court, established for the purpose of affording certain sorts of relief to the parties to a Christian marriage, and to them only, that somewhat similar relief will not be granted by some other Court in that country to the parties to a non-Christian marriage.

In British India, for example, we have special Matrimonial Courts erected on the model of the English Divorce Court, and it has been held there, following the decision in the *Hyde* case, that they are not open to the parties to a non-Christian marriage; but side by side with them we have the ordinary Courts, which administer to such parties forms of relief which are, to some extent, parallel to those administered by the special Matrimonial

[1] 15 P. & D. 76 [1890].

[2] In *Ganer* v. *Lady Lanesborough* (1 Peake 25, about 1891), it was held in an action of debt that the marriage of a Jew was dissolved by a divorce before the Rabbi at Leghorn, but the facts are not fully stated.

Courts; and it is to be gathered from the Natal Law No. 25 of 1891 that the position is in some respects similar in Natal. But no such parallel system of relief exists in England, and Lord Penzance, referring to the possibility of its being suggested that some such system should be established, says: "It may well be doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex." This goes to confirm the view expressed above (pp. 368-9) that it would be beyond the range of practical politics to attempt to deal with the personal relations of the parties to a non-Christian marriage in a country like England, except, perhaps, in regard to some special position.

Enforcement of other Rights arising under Non-Christian Marriage.—But this is very far from exhausting the question before us. It does not necessarily follow, because the judicial system of a country like England must abandon the idea of dealing adequately with the purely personal relations between the parties to a non-Christian marriage, that it should treat such a marriage as for all purposes a mere nullity, incapable of giving rise to any legal consequences whatsoever. It does not necessarily follow that it should refuse to recognise and enforce any proprietary or pecuniary claims to which the marriage may give rise between the parties to it—that it should refuse, for example, to entertain a claim by a Mohammedan wife to a sum due to her on account of her "dower," or a claim by a Mohammedan or Hindoo widow to succeed to the whole or a portion (say) of some funds left by her husband in England. Still less does it follow that, if there were children of the marriage, and they, on the death of their parents, claimed to succeed (say) to funds left by the parents in England, they should be held to be illegitimate, and as such not entitled to succeed. In short, it does not follow, as some have suggested, that our Courts in England should absolutely ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards, and all property left by an intestate among them as escheating or becoming ownerless.

Lord Penzance was most careful in his judgment in the *Hyde* case to guard against any such startling conclusions being drawn from his decision. At the close of that judgment he expressed himself as follows :—

"In conformity with these views the Court must reject the prayer of this petition; but I may take the occasion of here observing that the decision is confined to that object. The Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons, which people living under the sanction of such

unions may have created for themselves. All that is intended to be here decided is that, as between each other, they are not entitled to the remedies, the adjudication, or relief of the matrimonial law of England."

Besides the questions which Lord Penzance here expressly states that he meant to leave untouched, it is obvious from what he says that he means to leave similarly untouched other important questions, which may depend on the validity or invalidity of a non-Christian marriage. You may, for example, have a question of national character or domicile depending on the validity of such a marriage; or, again, the question of the validity of a subsequent marriage may depend on whether a previous marriage of a non-Christian type is to be deemed a valid marriage or not.

Title to Real Property in England.—But though these and all similar questions were left untouched by Lord Penzance, an important case had been decided by the House of Lords some years before, which is absolutely conclusive against the recognition of the validity of a non-Christian marriage for one particular purpose—namely, for the purpose of making out a title to succeed to real property [1] in a country like England. The case referred to is that of *Fenton* v. *Livingstone*.[2] It was a Scotch appeal, but it lays down a general principle of private international law which practically must be accepted by the Courts throughout the United Kingdom, and in at least some other parts of Her Majesty's dominions. As the general principle so laid down applies not only to non-Christian marriages, but to certain Christian marriages as well, it would be out of place here to discuss it at length; but it is important for our purpose to understand the exact purport and effect of the decision in *Fenton* v. *Livingstone*; and certain additional particulars to which we may have to refer later are given in a note further on.

Now as to the question that was decided in that case. It goes without saying that we must look to the law of the *situs* for those rules which would ordinarily be regarded as rules governing the transmission of real estate by operation of law—rules, *e.g.*, determining whether the eldest son, or the youngest, or all the sons, or all the children, are to take such estate in respect to which the father dies intestate; rules determining whether one of the parties to a marriage is, on the marriage taking place or on the death of the other party, to take any interest in the real estate of that other party, and the nature of the interest so to be taken. But suppose that, when we proceed to apply one of those rules to the case of some claim to real property, there emerges a question as to whether a certain marriage, on the validity of which that claim depends, is to be deemed valid, or as to whether the claimant or some person through whom he claims is to be deemed legitimate, are we to decide that question as we should decide it if the claim were one to movables,

[1] The rule in *Fenton* v. *Livingstone* probably does not apply to chattels real (see Dicey's remarks on the rule in *Birthwhistle* v. *Vardill* at pp. 505-7 of his *Conflict of Laws*.)

[2] 3 Macq. 497.

or must we decide it too, as the phrase is, according to the law of the *situs*?[1]

The Decision in "Fenton v. Livingstone."—What was settled by *Fenton* v. *Livingstone* was that we must decide that question, too, according to the law of the *situs*; and this has been explained to mean that though all the persons whose position and acts we might have to consider had been domiciled from first to last abroad, and all the material events—births, marriages, etc.—had occurred abroad, we should decide as if all these persons had been domiciled in the country in which the property is situated, and all these events had occurred there. The anomalous results to which this ruling gives rise have been much dwelt on in the discussions on the Colonial Marriages (Deceased Wife's Sister) Bill now before Parliament; but for the reason already given it would be beyond the scope of this article to discuss them. It is, however, necessary for our purpose to make two observations. In the first place it is important to note that, though it was urged in *Fenton* v. *Livingstone* that the marriage, on the validity of which the claim there depended, was one of a sort regarded with peculiar abhorrence by the law of the *situs*, and though the judgments in the House of Lords discuss this

[1] A similar question had arisen in *Birthwhistle* v. *Vardill* [1835-1839] (7 Cl. & F. 571 and 895), but had not been decided. In that case a son was born out of wedlock in Scotland of parents domiciled there. Afterwards his parents married there, and he became legitimate by Scotch Law. Then the father died intestate and seised of real estate in England, and the son claimed that estate as heir, contending that, being a legitimate son by the law of the domicile (Scotland), he must be held to be such in the *locus rei sitæ* (England) also. The case was heard twice by the House of Lords on appeal. On the first occasion, in 1835, the opinion of the judges was delivered by Chief Baron Alexander, and was to the effect (1) that the claimaint, being legitimate by the law of the domicile, must be held to be legitimate in the *locus rei sitæ* (England) also; but (2) that something in addition to this was needed to make him an heir to real property in England—namely, that he should have been born in matrimony; and that, as this something was wanting in his case, his claim could not be sustained. After some discussion by the Lords, a further argument was directed, and, on the occasion of the further argument in 1839, the opinion of the judges was again taken, with the result that the judges (they happened to be a different set) declined to give any opinion on our point—*i.e.*, the first of the two points above mentioned; but agreeing with the former set of judges on their second point, held on this ground only that the claimant must fail, and the House, accepting their view, gave judgment accordingly. To turn now to *Fenton* v. *Livingstone* [1859], 3 Macq. 397, which came before the House of Lords twenty years later. The facts of that case, so far as they are material for our purpose, were as follows: The respondent A. L. claimed, as lawful son of T. L., to succeed as heir of entail to estates in Scotland. It appeared that T. L., being domiciled in England, had there married in succession two sisters, Englishwomen, from the second of whom A. L. had been born in England. The marriage of A. L.'s parents, being that of a man with his deceased wife's sister, was illegal in England; but as A. L.'s mother had died in 1832, before Lord Lyndhurst's Act, without that marriage having been judicially declared void, A. L. would have had to be deemed legitimate in England and capable of succeeding to real estate there; and the question was whether, having thus to be deemed legitimate in the country of the domicile, he should also be deemed legitimate in the *locus rei sitæ*—a question exactly similar to that raised, but not decided, in *Birthwhistle* v. *Vardill*. The Court of Session decided in favour of A. L., on the ground that the law of the domicile must determine the question of

point at some length, the decision ultimately arrived at[1] was not based on any consideration of this kind. It was based on a principle which left no opening for such considerations to come in—namely, on the general principle above stated, according to which the Court of the *situs* should, in order to decide whether the marriage was valid or not, look only to its own law, paying no regard whatever to any other law; and that principle rests simply on a peculiar legal theory touching real property, and would apply with just the same force in the case of a marriage of a sort which the law of the *situs* had come to treat as invalid, not on any stringent moral or religious grounds, but merely on grounds of expediency, or even as the result of some of those historical accidents to which a considerable proportion of the law of all countries owes its origin.

The other point to be noted is that while the ruling in *Fenton* v. *Livingstone* in its application to Christian marriage affects only cases of an exceptional nature, in its application to non-Christian marriage it affects *all* cases; and the result is that, for the purpose of succession to real property situated in the countries in which it is to be followed, it makes the members of all races, whose marriage is non-Christian, bastards, and incapable of taking such property *ab intestato*, and that if, for example, a member of one of these races holds (say) a house in South Kensington in fee simple, and dies intestate regarding it, the result must be an escheat.

Results of Cases so far Examined.—The results to which we have now got are:

(1) that a non-Christian marriage is not a marriage in respect of which the English Matrimonial Court, or any like Court in Her Majesty's dominions, can exercise its peculiar jurisdiction;

legitimacy. On appeal to the House of Lords three distinct points were urged against A. L.—namely (1), that, the question being one of succession to real estate in Scotland, the Scotch Court ought, according to principles of private international law, to have looked only to its own law, and paid no regard to the law of the domicile; (2) that, even if it were admitted that the law of the domicile—the English Law—should govern the decision, it could not, having regard to the peculiar position established in England previous to Lord Lyndhurst's Act, be held that A. L. was *really* a legitimate son in England; (3) that, even if these two points were decided in A. L.'s favour, the law of the domicile should not, on principles of private international law, be given effect to by the Scotch Courts, because (as it was alleged, though not admitted) the law of Scotland condemned marriage with a deceased wife's sister in a peculiarly strong way, treating it as contrary to the law of God, and making it even punishable with death. All these points were discussed in the judgments delivered in the House of Lords, but their lordships ultimately (p. 560) decided on the first only, holding simply that, the question being one of succession to real estate, the Court of the *situs* should look only to its own law (whatever that law might be) in determining the question of legitimacy, and pay no regard to the law of the domicile. Strange as it may seem after what has been said above regarding *Birthwhistle* v. *Vardill*, two, or perhaps three, of the noble lords —and one of them Lord Brougham, who ought to have had a lively recollection of *Birthwhistle* v. *Vardill*—were under the impression that the point they were deciding had been decided, and similarly decided, in that case.

[1] At pp. 560, 561.

(2) that a non-Christian marriage is not a marriage through the medium of which a claim can be made out, in the United Kingdom and some other parts of Her Majesty's dominion, to succeed to real property *ab intestato*, or, it may probably be added, otherwise by mere operation of law.

As to the rest, the general question of the treatment to be accorded by the Courts of a country like England to a non-Christian marriage entered into in a foreign country in accordance with the law of that country, and of the extent to which those Courts can give effect to the legal relations, rights, and duties springing directly or indirectly from such a marriage, is, so far as we have hitherto carried our enquiry, completely open. We now come to a case decided by one of our most eminent judges (Mr. Justice Stirling) in 1888, which, according to the way in which it is to be understood, may or may not have an important bearing on that general question.

The Baralong Case.—The case referred to is *Re Bethell*,[1] commonly spoken of as the "Baralong case." The facts of that case, so far as they are material for our purpose, were as follows:—

Christopher Bethell, an Englishman domiciled in England, went out to South Africa in 1878, and remained there, retaining his English domicile, until he died. In 1883, when residing in the country of the Baralongs, a barbarous or semi-barbarous tribe living beyond the limits of British dominion, and having a polygamous system of marriage, he desired to find a woman whom he could marry according to the Baralong custom. On his applying to the chief with that object, it was suggested to him by the latter that he might marry the woman in church, but he insisted on marrying her according to the Baralong custom, saying, "I also am a Baralong." It was accordingly arranged that he should marry one Teepoo, a niece of the chief, according to the Baralong form, and he did so in October 1883, and took her to his house. On July 30, 1884, he died, leaving Teepoo surviving, who a few days after was delivered of a daughter.

The way in which the case came before the Court was this: W. F. Bethell, Christopher's father, who had died in 1879, had by his will devised certain real estates in England to trustees upon trust for Christopher during his life, and, in case he should die leaving a child or children, to sell such estate, and to hold the proceeds for such child or children; and if there were no such child, then the testator had made a devise in favour of his eldest son, William Bethell. The income of the property had been remitted to Christopher Bethell from the time of his father's death until his own death, and now the question arose whether the daughter of Teepoo was Christopher's legitimate child, and as such entitled to claim under the will. An attempt was made by the counsel for the child to show that the intention of the parties to the marriage was that it should be a monogamous Christian marriage; but the weight of evidence was the other way, and the Judge

[1] Law Rep. 38 Ch. D. 220: 57 L.J. Chanc. 487.

found that the marriage contracted was a Baralong marriage pure and simple—in other words, a potentially polygamous marriage.

The Decision of the Court.—This being the position, the learned Judge came to the conclusion that the union between Christopher Bethell and Teepoo was not a marriage which he could recognise as valid, and that the daughter must be regarded as illegitimate, and as having, accordingly, no right to take under the will.

Now we shall, no doubt, be all agreed that it was fortunate that the Court was able to arrive at that conclusion. It would be a matter of regret to us all if we were to find that a domiciled Englishman, whenever he happened to be among a polygamous tribe, could, by declaring in an airy way that he considered himself a member of the tribe, qualify himself for contracting a polygamous marriage, with the result that the Courts in England or in British India or other parts of Her Majesty's dominions would be bound to hold that marriage valid, and the offspring of it legitimate. It is only when we come to consider the grounds of the decision, that there is any room for doubt or misgiving.

Views as to the "Ratio Decidendi."—No case has yet come before a Court which would call for a detailed consideration of the judgment, but it has been found necessary to consider it for certain purposes out of court, and the result has been that a difference of opinion has arisen between persons eminently deserving of respect as to what should be understood to be the real grounds on which the learned Judge based his decision. Two views have been taken of those grounds, which may be called the narrower and the broader view. The former view is that the Judge decided as he did only because Christopher Bethell was, at the time of his marriage with Teepoo, an Englishman domiciled in England; and that consequently if Teepoo's husband had been a real Baralong pure and simple, domiciled and married in his own country, and had died leaving (say) money in the hands of an agent in England, as he might conceivably have done, and the daughter of the marriage had come to claim it as his next of kin, it is at least possible that she would have been held to be legitimate. It seems quite clear from paragraphs 605–7 of his *Commentary on the Indian Penal Code* that that eminent lawyer, Mr. J. D. Mayne, would agree with those who take this view.

The broader view is that the Judge decided as he did on the wider ground that every polygamous marriage must be held by a Court in England to be, for all purposes whatsoever, a mere nullity, and that he would accordingly, in the case just put, have held the daughter to be illegitimate.

Now, first, as to the narrower view. If it is right, Mr. Justice Stirling's decision is just what we should all have expected it to be.

The Element of Domicile.—If the English law of marriage adheres to a domiciled Englishman to such an extent and so persistently that he cannot

even contract a valid Christian marriage with his deceased wife's sister in a foreign country, where by the local law such a marriage is permissible, it may well be argued that, *à fortiori*, he cannot, by going into a country where a system of non-Christian marriage prevails, contract a valid non-Christian marriage. It may be added that the language of Lords Campbell and Cranworth in the *Brook* case [1] is sufficiently general to support the view that he cannot. Indeed, we may go further. It seems improbable that, even if Bethell had acquired, in a certain sense of the word, a domicile in the Baralong country, that is to say, if he had settled down there with the most absolutely fixed determination to remain there for the rest of his life and made all his arrangements accordingly—I say it seems highly improbable that such a settlement there would be held to carry with it any such change in his law of marriage as would result from a similar settlement in a civilised country. The laws of a barbarous or semi-barbarous country, especially those relating to marriage, would ordinarily be not territorial but personal and tribal laws, and no mere permanency of settlement would, according to our view, be sufficient to attract them to a civilised outsider. He would be regarded by us as still retaining what Lord Stowell called his "immiscible character" (see Dicey's *Conflict*, ed. 1896, App., note 1, pp. 723-4). It is no doubt possible under some circumstances for an outsider to make himself a member of a community living under personal laws, and thus attract the operation of those personal laws to himself; [2] but for this something beyond settlement, however permanent, in the country would be required, and we may be certain that, whatever conditions might be necessary for effecting such a change, our Courts would insist on their being fulfilled in the amplest manner and in the best of good faith. There is, perhaps, no community on earth that opens its ranks more readily for the reception of outsiders, and welcomes them more heartily to a participation in its religious and legal institutions, than that of Islam. A Christian professing himself a convert to Islam might, with little more ado, contract one or more Mussulman marriages which would be recognised as valid by the Mohammedan law; but a British Court would be more exacting, and, if it saw reason to believe that he had adopted his new religion in order (to use the words of the late Lord Justice James) that he might be "qualified for the enjoyment of polygamous privileges," it would probably hold his Mussulman marriages to be bad (see *Skinner* v. *Orde*, 14 Moo. I.A. at p. 324).

It thus appears, not only that the judgment of Mr. Justice Stirling could be amply supported on what we have called the narrower ground, but, further, that non-Christian marriages entered into by an Englishman form a class apart, and that, whatever conclusions we may come to on the general question before us, we need not feel troubled by any serious apprehensions

[1] 2 House of Lords 193 [1861]. See also Mr. J. D. Mayne's *Commentary on the Indian Penal Code*, s. 628.

[2] *Abraham* v. *Abraham*, 9 Moo. I.A. 195.

as to the effect upon them. We may accordingly dismiss marriages of this class from further consideration.

The Broader Ground—A Polygamous Union.—To turn now to the broader view of the grounds of the Judge's decision, it must be admitted that there is something to be said in favour of it. It seems certainly strange that if the learned Judge meant to decide as he did simply on the ground that Bethell was a domiciled Englishman at the time of his marriage, he did not expressly say so. Further, there is a passage in his judgment which at first sight reads as if he meant to put his decision on the wider ground. After referring to Lord Brougham's *dicta* in the *Warrender* case, which we have already (p. 374) discussed, and to Lord Penzance's decision in the *Hyde* case, he says: "I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union of one man and one woman to the exclusion of all others."

Conclusion as to Grounds of Decision.—I confess that when I first read the judgment, I agreed with those who take the broader view of the ground on which the decision rests; but on further reflection I have come to agree with those who take the narrower view and think that the learned Judge decided as he did merely because Bethell was domiciled in England at the time of his marriage. The circumstance that this ground is not expressly stated in the judgment may be explained by the course the argument had taken. The counsel for the infant referred to Bethell's English domicile, and admitted[1] that, if the marriage was a polygamous one, it was invalid. All their efforts were directed to showing that the marriage was not meant to be polygamous, and thus the real issue in the case was whether it was polygamous or not. On this, which was substantially an issue of fact, the Judge's attention would naturally be concentrated, and he had no occasion to trouble himself much about the law. As to the passage above extracted from his judgment, we are in no way driven to put upon it the construction put upon it by those who take the broader view, and which would make it deal with a variety of matters which the Judge was in no way called upon to consider.

The "Law of England" as Used in the Judgment.—It is submitted that when he said in effect that no non-Christian marriage was, as he expressed it, "a valid marriage according to the law of England," he was using the phrase "law of England"[2] in the narrower sense of the law of England governing English marriages, the essential portions of which an Englishman,

[1] P. 226 of report in *Law Reports* and p. 490 of that in *Law Journal Reports*.

[2] See Dicey's *Conflict*, p. 6.

like Bethell, domiciled in England, would carry with him abroad, and not in the broader sense of the law of England as including all principles of private international law which would be followed by our Courts. It seems impossible to suppose that the learned Judge could have considered that he was bound, by Lord Brougham's *dicta* and Lord Penzance's decision in the *Hyde* case, to hold that the law of England in the latter and broader sense must always and for all purposes treat a non-Christian marriage as invalid, and in particular that he would be bound by these authorities to hold that the child of a marriage contracted in their own country between members of a polygamous community there domiciled is illegitimate. Lord Penzance, as we have seen (pp. 379-80), most carefully guarded himself against being supposed to decide anything like that; and as for Lord Brougham's *dicta*, it will be seen, from what has already been said (pp. 374-6), that they could not bind any judge to hold anything.

Assuming the narrower view of the grounds of Mr. Justice Stirling's decision to be right, our general question is still a completely open one, and we must accordingly look beyond our English law reports to see whether we can find anything to throw light on it.

NOTES.

Hostilities without War.—Mr. J. S. Risley, writing on this topic, says: "The present state of affairs in China may possibly appear at first sight to be one of considerable anomaly. A powerful and far-reaching secret society has organised an armed rising for the avowed purpose of exterminating foreigners. The Chinese Government, whilst professing to treat the 'Boxers' taking part in this rising as rebels, openly and actively sympathises with them; and the Imperial troops have, beyond all doubt, taken part with the rebels in fighting against the foreign troops landed to protect the lives and property of foreign subjects. Much blood has been spilled on either side, Chinese forts and towns have been bombarded and seized, foreign diplomatic agents have been given notice to leave Peking, one of them has even been assassinated, and the fate of the rest is doubtful, and the invasion of China by the allied forces of the Western Powers has been, in fact, at any rate commenced. All these things have happened, and yet in the eye of International Law the relations of the Chinese Government and the Powers are at present (July 3) those of unbroken peace. Mr. Bumble, it may be remembered, had no very high opinion of English law, and many people of at least equal enlightenment at the present day are inclined to make a similar estimate of International Law; yet the wisdom of the latter, as exemplified in the Chinese situation, may be shown to fall not so very far short of true wisdom after all.

"Between the conditions of Peace and War there is in modern times a breathing-space. Nations are no longer small, savage tribes who fall treacherously upon each other in the night. Civilisation has made a surprise almost impossible, and nations have developed "conscientious objections" to wholesale bloodshed. Hence national disputes more closely resemble those of individuals, and much may happen between the serving of the writ and the final hearing of the case in Court. In the litigation of States there are certain recognised methods of procedure whereby a case may be compromised without reaching the terrible final trial of war. Setting aside such entirely peaceful proceedings as negotiation, mediation, and arbitration, there remain certain forcible means, short of actual war, of hastening the termination of international disputes. Forcible retaliation for an injury usually takes the form of reprisals, embargo, or pacific blockade, and its object and inevitable result is to bring the aggressor 'to his bearings' and compel him to join in arriving at a peaceful settlement or else to declare war.

"Reprisals and other acts of hostility without war clearly cannot be continued for any length of time between two great civilised Powers. An 'insult to the flag' must inevitably produce enormous public excitement, and an outrage upon the national dignity must nearly always precipitate the outbreak of war. But in dealing with barbarous or semi-barbarous communities, hostilities without war may constitute a useful measure of police. By this means civilised Powers are enabled to coerce a barbarous State, whose home or foreign policy is a source of serious and imminent danger to the world at large, *without the disturbing effects on treaties, trade, and property incident to actual and declared war.* This is well illustrated by the present situation in China. The lives and property of Europeans throughout that country are placed in imminent danger by the insurrection of the Boxers, which the Chinese Government either cannot or will not suppress. The landing of troops by the Powers was, primarily, no act of reprisal for injury, but an armed intervention justified by overwhelming necessity. It was, in short, an international 'act of police,' which the Chinese Government is not obliged to resent, but may, if it sees fit, resent by declaring war on the intervening Powers. The conflict of European forces with the Chinese Imperial troops may lead to this result at any moment, and a wholesale massacre of Europeans in Peking might, similarly, lead to a declaration of war by the Powers; but until a state of war is actually recognised the relations of China with the latter must be regarded as peaceable, and their intervention merely friendly aid in securing peace and order in her territory. The foundations of English law are laid deep in the bed-rock of legal fiction, and therefore, to English lawyers at least, there should be nothing startling in the fiction that the Powers are at present engaged in assisting the Chinese Goverment to put down an armed insurrection of its subjects."

Egyptian Companies.—The Khedivial Government has been making a commendable effort to regulate the companies which the growing prosperity of the country and the influx of capital have created—"the swarm that in its noontide heat were born." Hitherto the promoter, unfettered by any legislation, has drawn his memorandum and articles of association pretty much as he liked, and the State Legal Department has had cast upon it the labour of discussing whether the basis of the proposed company was or was not admissible. Some general conditions of incorporation and regulation had obviously to be imposed, and this has now been done. The memorandum of association must be an official deed (*acte authentique*). The number of members must not be less than seven. Companies cannot be finally incorporated until the whole of the capital has been subscribed. Shares to be converted into bearer securities must be fully paid up. In order to authenticate the appearance on the scene of a new company the memorandum and articles are to be published in the official journal. New shares cannot be issued at a discount; if issued at a premium, the surplus must be carried to a reserve fund. The inflated price at which properties

are sold to companies by promoting syndicates—the fruitful cause of so many company frauds in this country—is met by a system of independent valuation analogous to that in France and Germany, substituted for the biassed appreciations of interested vendors. Other regulations deal with the issue of the debentures, with founders' shares, and general meetings; and (which adds greatly to their authority) all have been arrived at after a careful scrutiny and comparison of other foreign systems of company law—France, Italy, Germany, Belgium, Portugal, Holland, Roumania. These regulations, however, it must be borne in mind, apply only to companies formed in Egypt. The majority of companies formed to do business in Egypt are incorporated abroad, and, being so, are—at present—independent of Egyptian control. Sir Walter Scott, in his romance of *Rob Roy*, tells us of a curious purse of the great freebooter, with a miniature pistol artfully contrived so as to shoot any one who meddled with the clasp. The mechanism was most ingenious, but, as Sir Walter observes, there was nothing to prevent the thief from ripping open the pouch with a knife without risk from the pistol. The promoter will no doubt keep out of range in the same way. But it would be very simple to give check by imposing, as most countries now do, conditions on immigrant corporations.

The Law of Nature.—Primitive systems of law and custom are but rude attempts to outline elementary rights, and so to save society from becoming a "wild waste of passion." They owe their expansion and progressive refinement to their coming in contact with an environment of larger, loftier, and more enlightened ideas, and the law of nature is perhaps as good a phrase as can be found to sum up these invigorating ideas—"evolution ever climbing after some ideal good." We may see the process illustrated in the history of many nations—in the moral and spiritual principles of Christianity influencing the hardness and narrowness of the old Jewish law. We may see it in the case of Rome in the influence of the Prætor's administration of the *jus gentium*, and later of the Stoic doctrine of right reason—a scintilla of that world reason (*mens universi*) which the Stoics postulated. We may see it in our own country in the engrafting of equity on the old rude stock of the Common Law, a development presupposing the existence of an ideal justice to which our actual systems are ever approximating. In modern times the influence of this law of nature may be seen, as Sir Frederick Pollock has lately pointed out, in the tendency on the part of our law to appeal to a general idea of reasonableness residing in the breasts of the twelve jurymen who typify the common sense of the community. This is what Lord Hobhouse meant when he said that "Juries have kept our laws sweet," they have kept them in touch with human life and "right reason." The model trustee—the ideal prudent man of business that equity judges are so fond of parading—is traceable to the same source. For a wide extended Empire like ours, with its varied systems of law and native custom, Hindu, Mahommedan, Parsee, Chinese, this law of nature has a very real

significance, because it is only by the good sense of our judges acting in the light of it—in that natural equity which the law proclaims—that the problems which are ever growing out of the conflict of systems can be successfully solved, and can be made to contribute to the unity of the Empire.

The Summary Punishment of Perjury in Gambia.—Mr. J. Rennor Maxwell, who for many years occupied a place on the judicial bench of Gambia, in a communication to the JOURNAL OF COMPARATIVE LEGISLATION calls attention to the danger to the community of the laws which, in recent years, have been passed in some Crown Colonies, conferring on Judges and even on petty magistrates the power of committing witnesses to prison for perjury—or rather on suspicion of perjury—as for contempt of Court, *without trial.* "This legalised danger," says the writer, "originated in Hong Kong, but has now extended to Ceylon, Sierra Leone, the Gold Coast Colony, and Lagos. To expose the unwisdom of these summary powers I will state the law of perjury and the summary procedure in perjury as they exist in the Colony in which I am now resident—the Gold Coast Colony. The definition of perjury in the Criminal Code of the Colony, (Ordinance No. 12 of 1892) is as follows:

"A person is guilty of perjury if, in any written or verbal statement made or verified by him upon oath before any Court or public officer, he states anything which he knows to be false, or which he has not reason to believe to be true (s. 382).

"A person can be guilty of perjury by swearing that he believes a thing which he does not in fact believe, (s. 383).

"This is the present substantive law of perjury in the Gold Coast Colony. There is no necessity, according to Gold Coast Law, to prove in a trial for perjury that the matter falsely sworn to was material to the issues, or that the Court was one of competent jurisdiction; nor is it clear from the enactments that the false oath must have been wilfully, corruptly, and deliberately taken; nor that the proceedings in which it was taken were of a judicial nature. The adjective law is even more objectionable."

"S. 44 of the Criminal Procedure Ordinance 1876—imported into West Africa in the early nineties—enacts as follows:

"(1) The Court, if it appears to it that a person has been guilty of perjury in any proceeding before it, may,

"(*a*) Commit him for trial upon information for perjury, and bind any person by recognisance to give evidence at such trial; or

"(*b*) Commit him to prison as for a contempt of Court for six months with or without hard labour; or

"(*c*) Fine him a sum of fifty pounds.

"(2) This section is subject to the following limitations:

"(*a*) If a District Commissioner order a person to be imprisoned or to pay a fine, he shall, within three days, forward to the Chief Justice a certified

copy of the notes of the proceedings, and the Chief Justice may, without hearing any argument, vary or set aside such order.

"(*b*) Any imprisonment or fine ordered or imposed under this section shall be a bar to any other proceedings for the same offence, except in the case where the order of the Commissioner is set aside by the Chief Justice.

"(*c*) A District Commissioner may not impose imprisonment for more than three months, or a fine of more than twenty-five pounds under this section.

"Under this section the Court may commit a man to prison, or fine him on the bare suspicion of perjury—If it appears to it": and without the testimony of even a single witness, though English Law requires at least two to convict on an indictment for perjury. The result is to make the witness-box a terror to the nervous witness, to cause reticence from over-caution, and so to prejudice in the end the interests of justice.

"Then there is the danger in the case of illiterate witnesses giving evidence through an interpreter. During the short period since I resumed residence in the Gold Coast Colony, I have observed how jealous some of the Gold Coast magistrates are of what they consider their right to be guided solely by the interpretation of their official interpreter. I have seen counsel rebuked for suggesting on very good authority that an official interpreter who was interpreting in what was to him a foreign language, might have been mistaken in his interpretation. As the English magistrates do not speak the native languages, is it equitable that they should have the power of ordering a man to prison, not only on suspicion, but on suspicion founded on hearsay evidence? If the witness had been committed for trial, he might, at the trial, have been able to satisfy the tribunal that the interpreter failed to convey to the Court what he did actually say. With Judges of the judicial calibre of Sir W. B. Griffith, the present Chief Justice, and his learned puisnes on the Bench, there is no danger of these summary powers being abused, but in the hands of less able and upright Judges they might easily be. The absence of any public opinion in some of the Crown Colonies where these powers are operative is a very important factor in the situation."

Married Women's Property in Babylon.—Professor Sayce, in his new volume, *Babylonians and Assyrians*, mentions one or two facts about the law of husband and wife which show that at a very early age that law had reached in ancient Babylon a high state of development. "One of the documents that have come down to us from the age of Abraham records the gift of a female slave by a husband to his wife. The right of the woman to hold private property of her own, over which the male heirs had no control, was early recognised by the law. In later times it is referred to in numberless contracts." Her property, which in a commercial community, such as Babylon was, consisted chiefly of personalty, belonged to her. Assyrian women seem to have enjoyed almost as many privileges as the Babylonian. They could hold civil offices, and even act as governors of cities. The Married Women's Property Act had been anticipated 500 B.C. and earlier. A married woman

not only retained the property in her dowry; she could dispose of whatever came to her by inheritance, or gifts, or profits in business, and, still more remarkable liberty, she could freely adopt children. There is one curious feature of the law which Professor Sayce does not entirely clear up: a second marriage invalidated the first if the first wife was still living. And this in a country in which polygamy was recognised! The book, like all the best recent contributions to the history of early institutions and law, is calculated to inspire caution in making generalisations as to the constitution of ancient societies. As far back as the archæologist can go in the study of ancient Babylon, the individual, not the family, is the unit in the commonwealth. A natural consequence was the early development of the will. Scholars, such as Dr. Oppert and Professor Sayce, have done much to clear up the legal systems of Babylon and Assyria. But when shall we have a collection of typical ancient legal instruments?

Animals and their Rights.—Is there any juridical relation (*société juridique*), asks M. Henri Rolin in the *Revue de Droit International et de Législation Comparée*, between men and animals? Have animals, like ourselves, positive rights sanctioned by the sovereign power? As a rule, people would not hesitate to say, no! Right in their estimation exists only for men, and if the law protects animals against acts of brutality, and punishes such acts, it does so solely in the interest of men. Those are the only rights it has in view. M. Engelhardt, in his recent work, *De l'Animalité et de son Droit*, does not subscribe to this view, nor does his reviewer. M. Engelhardt pictures "la société nationale," "la société internationale," and finally "la grande société de tout le genre humain," as forming three concentric circles; and he asks why we should not conceive of a fourth circle with a larger orbit still embracing animals. This animal jurisprudence, M. Engelhardt admits, has not yet organised itself, but it is tending to do so.

M. Engelhardt points out in the first part of his book how near animals are to us physically, intellectually, and morally: we treat them, he says, almost like poor relations (*des parents pauvres*). Evolutionary biology and pathetic anecdote have alike helped to lower our pride. In the second part M. Engelhardt goes on to show the power of the sentiment which is struggling to save animals from suffering: a power evidenced by the existence of no less than 1009 societies for their protection. The crucial question still remains: Have the laws which have been passed been inspired by regard for the moral education of men merely, or by a sentiment of pity for the animals themselves, by the idea of a common origin between them and man, by the conviction that according to natural law they really have rights? Once prove that animals are protected for their own sakes, and we must admit that they have positive rights, though, like children, they may be unconscious of them, and though such rights have to be vindicated for them indirectly. Thus "a new planet swims into our ken." It is a large vista which M. Engelhardt opens, in claiming this new territory for juridical

science, but he has behind him the forces of progress and humanity, and the encouragement of many a conquered province.

Mining Leases and Subterranean Dragons in China.—Mining leases are in all countries full of complex covenants; but nowhere out of China have the lessor and lessee to provide for disturbances of working by earth spirits and subterranean dragons. In the mining concession, lately granted by the Chinese Government to Mr. Pritchard Morgan for mining in the province of Szechuen, there is a clause to this effect: "In excavating, so long as the mines dug below the surface are not injurious to the soil above, rascals are not allowed to obstruct the work on the ground that it is injurious to the Fêng Shui (the earth spirit)."

The Revision of Case Law in America.—The burden of Case Law presses even more heavily on American than on English lawyers. In the *American Law Review*, Vol. 34, p. 392, Mr. E. Payson offers some suggestions for its abatement. He does not go quite so far as Lord Campbell, and recommend a decennial *auto da fé*; he is for "sieving" cases—an abridgment of the Reports by a Case Law Revision Committee analogous to our Statute Law Revision Committee. All growth, as he justly says, implies much waste material, and the growth of law is no exception. Why should so much of this waste product be preserved—the details of experience reproduced in endless repetitions? Elsewhere a gradual synthesis of experience into rules and generalisations extricates most that is useful and permanent, purging the dross: why not a similar elimination from Case Law of what is obsolete, false, useless, or mere repetition—in fact, an up-to-date revision by an authoritative body? Think of the saving of the time now spent in Court over canvassing authorities; of the emancipation, too, of the lawyer, from the drudgery of ransacking thousands of volumes, and reconciling contradictory cases! Much might undoubtedly be done in this way to systematise and rationalise the heterogeneous mass of Case Law, and to prepare the way for a code. Much has, in fact, been done in England by the *Consolidated Digest of English Case Law* (Mr. Mews's), but it has not been done authoritatively. In Mr. Payson's scheme the Revision Committee would be armed, it is presumed, with full powers to use, not only the pruning-knife, but, as Mr. Puff would say, the axe. Would these powers be conceded? There is this also to be remembered: that one of the most remarkable characteristics of American and English Law is its continuity, and it is only the historical method of studying case law which gives an insight into the true principles of its evolution.

Railway Companies and Negligence.—To railway companies belongs mainly the expensive privilege of developing the law of negligence. The difficulty in most of these cases is in drawing the line between suggestions of possible precautions and actual negligence. This difficulty was illustrated in a recent Canadian case (*Wood* v. *Canadian Pacific Railway Co.*, 30 R.S.C. of Canada 110). The company there had allowed the road-bed

to become overgrown with grass and weeds; a porter was coupling two cars, and in getting from between them as the engine backed in, he caught his foot in the grass and weeds, and was struck by the train and sustained serious injuries. But it is not because an employé is injured that the company is liable for negligence. It is not bound to make provision for every possible contingency: "lex non cogit ad impossibilia;" so to hold would make its position intolerable. It is only bound to guard against dangers which are apparent to any person of average intelligence. A track overgrown with weeds is not attended with obvious dangers. The English case most like this is *Crafter* v. *The Metropolitan Railway Co.* (L.R. 1 C.P. 300), where a passenger slipped on a flight of stairs leading from the high-road to the company's station in consequence of the stairs being bound with brass and worn by traffic. It was argued that the company might have used lead instead of brass, might have provided a handrail, and so on; but "might" is not to be translated to mean "ought." The human imagination, whether it is that of directors or other persons, is not endowed—providentially—with a vision of all possibilities of danger, or set the impossible task of providing against them.

Hong Kong and the "Bully."—The "bully," "fancy-man," or "souteneur" has become recognised as a social pest of the worst kind; and not only the United Kingdom, but colony after colony has been legislating for his extermination. The most drastic measure is that passed this year by the Legislative Council of Hong Kong. By this Ordinance "every male person who knowingly lives wholly or in part on the proceeds of prostitution" is made liable on conviction to imprisonment for any term not exceeding three months, with or without hard labour; but the distinctive character of the legislation consists in the provisions for facilitating conviction. Thus a magistrate is empowered by (s. 8 [2]), in case of a suspected house, to issue a search warrant and arrest the offender; and under (3) comes the following: "When a male person is proved to live with, or to be habitually in the company of a prostitute, and has no visible means of subsistence, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution." This presumption meets what is a serious impediment in the way of enforcing the law—the difficulty of getting evidence from the oppressed against their tyrants. A still more effectual remedy provided by the Ordinance is banishment by an order of the Governor-in-Council in the case of persons convicted under the Ordinance not being natural-born or naturalised British subjects.

Codification of the Commercial Law of the Empire.—It is earnestly to be hoped that the resolution of Lord Avebury at the recent Congress of Chambers of Commerce of the Empire, and his remarks in moving it, will will bear fruit. The resolution was in these terms:

That the Bills of Exchange Act of 1882, the Partnership Act of 1890, and the Sale of Goods Act of 1893, and other Statutes, having shown the practicability

and advantage of assimilating and codifying British Commercial Laws, it is highly expedient that the Commercial Laws of the whole British Empire should be assimilated and ultimately codified, and the Government be memorialised by this Congress to take the necessary steps to appoint, for these purposes, a Commission on which the United Kingdom and all the Colonies and countries embraced in the Empire should be duly represented.

In moving the resolution, Lord Avebury said: "I might just illustrate what we think would be the advantages of this course by making a few remarks upon what happened with reference to the Bills of Exchange Act. Before that portion of the codification of the Commercial Law of the Empire took place, the law relating to bills of exchange and cheques was scattered through a very large number of Acts of Parliament and a still greater number of legal decisions, which it was almost impossible for any man of business to carry in his head or to have the opportunity of referring to. In the second place, there were a good many—I do not say a very large number—but there were a good many points in which the Commercial Law of England, Scotland, and Ireland differed from one another. And in the third place, there were several questions as to which the law had not pronounced, and with reference to which the best legal advisers could only say that the law was still quite uncertain. Although, naturally, these points dealt with questions which were not likely to arise very often, still they were questions which might involve many thousands of pounds, and might lead to very great commercial suffering. And then, lastly, there were some points on which the Courts had decided questions brought before them—and I have no doubt with quite legal accuracy—but in a manner which was entirely inconsistent with what was thought best by the entire mercantile community. The London Chamber of Commerce, therefore, had a Bill drafted which dealt with the whole of the law relating to bills of exchange and cheques, and that was referred by the House of Commons to a very strong Committee. We discussed it at considerable length. We were able in almost all cases to assimilate the law of the three kingdoms together. In some cases our Scotch friends took the law as it existed in England; in others we took the law as it existed in Scotland; but I may say that in no single point did we consider whether it was Scotch Law or whether it was English Law—the one principle which guided us was whether it was the law which would be the most convenient to the mercantile community generally. The result of that Committee was that at length the Bill became an Act of Parliament, and it has been found unnecessary to make any changes in it. Legal actions have been very much diminished, because the law has been made clearer and more accessible; and I believe that I am correct in saying that the same Act has been adopted in several of our self-governing Colonies, so that it has not only become the law of the United Kingdom, but of many other parts of the British Empire also. I think, Mr. President and Gentlemen, it is almost self-evident that there

must be great commercial advantages in extending this principle to other departments, and in carrying the principle of codification farther than it has gone at present and following the example which has been adopted and set before us in the three Acts which are mentioned in this resolution. We are here as men of business and as practical men, and we have a great many other questions before us. I have heard of no difference of opinion with reference to the particular resolution which I have now the honour of moving, and I think, therefore, that under those circumstances I should be unjustifiably intruding on your time if I were to go into any detail in laying this resolution before you." The resolution was carried unanimously.[1]

Trusts in the United States.—In *The Quarterly Journal of Economics* is an account by Mr. R. C. Davis of "Judicial Decisions on Statutes prohibiting Combinations and Trusts." The Sherman Anti-Trust Law of 1890 was one of the first of a series of Acts adopted in twenty-seven States and territories intended to prohibit industrial combinations called trusts. The Supreme Court has held that such legislation does not contravene the fifth and fourteenth amendments to the Constitution of the United States. At first there was a reluctance to go beyond the Common Law. But recent decisions give full effect to the popular idea of the intention of the Legislature. "We have," says Mr. Davis, "two decisions of the Supreme Court which distinctly lay down the principle that the language of the Act is to be construed in accordance with its 'evident intention; and contracts or agreements which are in restraint of trade in inter-State commerce, whether reasonable or unreasonable, are illegal, and are subject to injunction or to criminal prosecution under the Act." Meantime some of the great trusts, or "combines," are suffering from two evils even more serious than the Anti-Trust Law—over-capitalisation and heavy State taxation.

What is Neutrality?—In a recent number of the *Journal du Droit International Privé* is a *causerie* on the question of neutrality by M. Féraud-Giraud, Honorary President of the Cour de Cassation. It deals with a topic of living interest. Is it an answer to a neutral charged with favouring a particular belligerent to say, What I do for A. B. would be a breach of neutrality but for a treaty. I act as I do in virtue of an agreement made before war broke out. M. Féraud-Giraud thinks this no answer. "Il me paraît impossible d'accepter aujourd'hui, en ce qui concerne les conséquences de faits portant atteinte à la neutralité, qu'on établisse une difference entre ces faits, suivant qu'ils se produiraient en vertu d'accords anciens antérieurs à l'ouverture des hostilités, ou en vertu de conventions postérieures à la déclaration de guerre." Either such agreements are made with reference to a time of peace, and as such inapplicable to a time of war, or they are made in view of hostilities—they record a resolution not to be neutral.

[1] For history of the movement of codification of Commercial Law, see the *Nineteenth Century*, May 1900, p. 860.

The Historical School of Jurisprudence.—In a brochure entitled *Le Droit Pénal Anglo-Indien*, Dr. Speyer describes the Indian Criminal Code, its history and characteristics. He sees in it a brilliant application of the theories of Bentham's school, he bears testimony to its success, and he is enthusiastic over the fact that it governs the relations of about two hundred millions of persons differing as much from each other as Spaniards from Esquimaux—a multitude more heterogeneous than the whole of Europe. Dr. Speyer draws from the facts which he narrates the conclusion that the historical school of jurists, such as Savigny, were much too dogmatic when they asserted that every legislative reform ought to be the spontaneous emanation of the mind of the nation and the result of a progressive evolution of law, and when they condemned all reforms involving the substitution of a foreign system. Has not too much importance, Dr. Speyer asks, been attached in regard to Criminal Law to the differences between men and men? In this connection may be mentioned the interesting paper in the last number of the *Jahrbuch* of the *Internationale Vereiningung für Vergleichende Rechtswissenschaft*, in which Dr. Fritz Stier-Somlo examines historically and analytically, with novelty and freshness, a problem which, since the days of Savigny and Puchta, has been prominent in German jurisprudence—*die Volksüberzeugung als Rechtsquelle.* What they and their successors meant when they said that one of the chief sources of law was the popular sentiment, conviction, or opinion, was never very clear. Dr. Stier-Somlo traces the genealogy of the idea up to Schelling, from whom Puchta borrowed it, importing it into jurisprudence and making it a feature of the doctrine of the historical school. The analysis of the facts which Savigny had in his mind leads the author of the paper to the conclusion that this "mysterious entity" (*Volksüberzeugung*) is not a true source of law. We are not concerned to state Dr. Stier-Somlo's own theory, but his paper is one of many indications of the declining sway of the historical school in its early home.

Adoption in Indian Law.—The *Bombay Law Reporter*, in its review of Indian cases decided last year, refers to the many recent decisions on the subject of adoption. Beginning with the famous decision of the Privy Council to the effect that the adoption of an only son is not invalid—thus overruling the opinions expressed by two High Courts—it is remarked that several important points, more or less open, have lately been covered by decision. For example, the Bombay High Court has held that the Datta Homa ceremony is not essential to the validity of the adoption of a brother's son, even though the parties be members of one of the three regenerate classes, or when the adoptee is of the same *gotra* as the adopter. The Judicial Committee has also decided that A. may "associate" one of his wives with a child who is adopted, so that she becomes the mother, for purposes of inheritance, to the exclusion of other wives. All these decisions suggest the reflection how imperfect was the old law of adoption, how silent the few texts are as to cases certain to occur, and

how it has been left to courts and text-writers in recent times to eke out by analogy the gaps in primitive law.

Pensions and the Doctrine of "Ultra Vires."—The doctrine of *ultra vires*, or keeping a corporation to its proper objects, is one entirely consonant with common sense and public policy. Incorporation is a privilege granted by the State for defined purposes, and any *ultra vires* acts are an abuse of the privilege. Besides which, members have embarked their money on the faith of its being applied to the objects specified, and to no others. But the doctrine is one which, as Lord Selborne said, is to be reasonably and not unreasonably understood and applied; and whatever may fairly be regarded as incidental to or consequent upon those things which the Legislature has authorised ought not—unless expressly prohibited—to be held by judicial construction to be *ultra vires*. The doctrine, in other words, must not be converted into a commercial strait-waistcoat. On this enlarged principle of interpretation it has been held in England that a fire insurance company is not acting *ultra vires* in paying a loss by fire, though not among the risks covered by the policy, liberality of dealing in such cases being beneficial to the company's business. Similarly, it has been held that a trading company may give reasonable gratuities to its servants as an encouragement to faithful service. It is satisfactory to find the same policy of enlightened common sense governing the judicial view of companies' powers in New South Wales. The particular case was one of a Mutual Provident Society doing business on a very large scale, and the question was whether the society could apply a sum of £25,000 out of its funds to form a superannuation fund by virtue of a power in its Act of Incorporation to make bye-laws generally "for the efficient management of the affairs and business of the society." The Court unhesitatingly came to the conclusion that it could. The success of such a society, as the Court pointed out, is mainly dependent upon the skill, ability, fidelity, and integrity of its officers, and it is of great importance for it to retain and attach to its service trained, competent, and reliable servants, who might otherwise be enticed away by rival societies, and irremediable injury thus done to the society's business. In the present struggle for existence the prospect of a pension is becoming more and more a determining factor.

Englishwomen and Mohammedan Marriages.—It is clear that the study of Comparative Law is a desideratum for the fair sex as much as for any Dryasdust lawyer. There may be some Englishwomen content to share the privileges of matrimony with three or four other wives, and to have the matrimonial knot severed at any moment by their husband at his own pleasure, without cause shown or any judicial intervention whatever; but intending wives ought certainly to know what is in prospect before they commit themselves to this precarious form of union approved by the Koran, which to English notions is not much better than the mock marriage before the sham clergyman familiar in romance. The Report of the Egyptian

Ministry of Justice calls attention to the danger of these mixed marriages before the religious jurisdictions. An Englishwoman, for instance, fresh from home and entirely ignorant of local law and customs, goes through a form of marriage before the Cadi with some Egyptian gentleman, is presented with an imposing-looking document purporting to be her marriage-lines, and imagines herself—until disillusioned—as securely and irrevocably united to him as if the ceremony had been performed in London by an English clergyman. It is satisfactory, therefore, to find that by an arrangement with the Grand Cadi the Mazouns of all the Mehkémés are instructed—whenever they are asked to unite a Christian or Jewish woman to a Musulman—to insist upon her personal attendance before them, and explain to her the provisions of the Koranic Law concerning polygamy and divorce before they permit her to sign the register. If after the "Wull ye venture?" of the Scotch minister, addressed to them in this form, they elect to go on, they have only themselves to thank for the consequences. The danger is one not confined to Egypt. Periodically there come warnings from the British chaplain in Paris concerning marriages of Englishwomen with Frenchmen; there was one only the other day in the case of marriages with Frenchmen in England. The clergy ought to know, says the chaplain, that those contracting such a marriage should bring a certificate from the French consul in London, or where the marriage takes place, to state that there is no impediment to the marriage in France in the shape of a refusal by the parents to consent, or some other unfulfilled condition precedent.

Law and Public Opinion.—"Law so dry! I deny it," said Lord Bramwell stoutly. So does Professor Dicey, and his lecture on Law and Public Opinion is itself a refutation of the vulgar error. Perhaps it is none the worse for some waves of Platonic paradox. We may surmount the first without much difficulty, that man—the so-called rational animal—does not act from reason; but can he be said either to act, as Mr. Dicey would have it, from the "logic of facts," the combination of reason, and the circumstances of the time? Is it not much more true to describe the chariot as whirled along in the Platonic metaphor by the black horse and the white horse with what control the charioteer of reason is able to exert? Διανόια ὀυδὲν κινεῖ. It is the strong, deep, divine currents of human sympathy and moral aspiration which have made and are making the law, though reason may have helped to mould it into form. So-called public opinion is mostly made up of public sentiment. Another paradox of Mr. Dicey's is that the first twenty years of this century, what he terms the period of Blackstonian optimism and fear of change, was a period of stagnation. But what of Bentham and James Mill, of Sir James Mackintosh and Brougham and Sir Samuel Romilly? The stream was swelling, though the official ice had not begun to crack. The most curious of Mr. Dicey's paradoxes is that our legislators, the elderly men of mature judgment, represent the public opinion of thirty or forty years back. The reasons on which they act, says the critic, are those

which they heard from their fathers. The present opinions they hear from their sons, but they pay little attention. This petrifaction of the legislative mind is so startling a theory that we must wait for Mr. Dicey to develop it more fully.

Heroic Social Remedies.—A writer in the American *Journal of Sociology*, contemplating the Sisyphean struggle with evil, discusses a heroic remedy—to wit, the prevention of progeny of certain classes of the criminal and degenerate. "This method," says the writer, "is highly commended and strenuously urged by competent persons in many lands—notably in England, Germany, and the United States. From the standpoint of private and public right and welfare the use of castration for the purpose in question is certainly not indefensible. The right of Society to protect itself by isolating for a considerable time, and for life if need be, the insane, the epileptic, the leprous, and the criminal is unquestioned. If in self-defence it may deprive these of the exercise of all powers for an indefinite time, or for all time, it is difficult to see why the same right does not warrant it in depriving certain classes of a single power which they can never exert save to the hurt of all concerned."

Customs among the Jains.—In regard to law, customs, religion, and (as is shown in a paper in the *Imperial and Asiatic Quarterly*) philosophy, there are in India no more interesting communities than those of the Jains. A long series of decisions has been given in respect to the customs of inheritance, etc., among them. The question has generally been whether the Mitakshara prevailed among them, or whether there exist among them certain customs as to inheritance or adoption which must be judicially recognised. In *Harnab Pershad* v. *Mandil Dass*, reported in a recent number of the *Calcutta Law Reports*, the point to be decided was whether customs recognised among the Jains in one place were admissible as evidence of the existence of these customs in another place, and whether a childless Jain widow might adopt a son without the permission of her husband or his kinsman. The Court decided affirmatively, and in doing so it made some interesting remarks on the position, customs, religion, and ceremonies of the Jains. As is well known, though of Hindu origin, and in general conforming to Hindu law, they do not recognise the divine authority of the Vedas, and they do not practise the *stradh*, or ceremony, of the dead. It has long been accepted law, said the Court, "that in the absence of proof of special customs, the ordinary Hindu law must be assumed to prevail as among the Jains (see case of *Chotay Lall*). . . . We see in the evidence no sufficient foundation for the contention that there is any difference in the customs observed at places east and west of Cawnpur. . . . It may be conceded that in ceremonials the practices vary at different places, and even in Arrah itself, and that the views of some Jains are much stricter than those of others. It may be conceded also that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although

this is not confined to Arrah itself. The reason is pretty obvious. The Jains have no written *shastras* and no priests of their own. Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they are best acquainted. . . . There is this fundamental distinction between the Jains and the orthodox Hindus, that their belief in the nature of the future state is wholly different. A son among the Jains confers no spiritual benefit on the state of his deceased father, and the Jains do not believe in or observe the *stradh* ceremony as it is observed by the orthodox Hindus. Some Jains also may worship or do homage to some of the Hindu deities, but they have their separate temples which no orthodox Hindu would enter, and their separate deities whom no orthodox Hindu would worship. Mere approximation in the observance of ritual or ceremonial does not, therefore, do away with the difference which exists between them, and we see nothing to differentiate the Jains at Arrah from the Jains elsewhere, as regards the observance of any customs peculiar to them, or, indeed, in any other respect save perhaps this, that where the Jain communities are larger and more connected, there may be less of the ordinary Hindu ritual."

Reciprocity of Matrimonial Obligations.—"Per iniquum enim videtur esse ut pudicitiam vir ab uxore exigat quam ipse non exhibeat." Thus the Roman jurist! The sentiment is not strictly accepted by our law. But the general principle is fully accepted by English law in this sense, that marriage is recognised as a contract of reciprocal obligations, and that one spouse cannot disclaim such matrimonial obligations and yet hold the other to them. This mutuality has been recently illustrated by two cases, one in our own Court and the other in the Cour Supérieure de Québec (*Gibson* v. *Patrick*, vol. xvi., p. 504). In the Quebec case the wife had sued for a separation and her suit had been dismissed; but instead of docilely returning to live with her husband she abandoned the conjugal home, and then some years afterwards (*splendide audax!*) registered her claim for dower against the immovables of her husband! Marriage would be a very one-sided affair if this feminine manœuvre had been successful; but it was not, and the Quebec Court, without any compunction, told the lady that if she did not return to the *domicile conjugal* within thirty days she would forfeit all the rights and advantages of marriage, and in particular the registration of the dower would be vacated. In the English case, *Synge* v. *Synge*, the wife took up a no less anti-connubial attitude. "I will live with you," she said in effect, "provided you are a husband only in name; otherwise not;" and when the husband refused these novel conditions she charged him with desertion. A wife may have reasonable grounds for refusing her husband marital rights, but the desire to shine on the stage is not one of them.

Medical Practice and the Sale of Quack Medicines.—The vendor of quack medicines interferes, there can be no doubt, with the business of the regular medical practitioner, and this being so, it is not unnatural

that the Medical Council of Quebec should declare war upon him. But it is one thing to set the law in force against such a vendor, and another to organise a plot like that in *Collège des Médecins* v. *Tucker* (17 Quebec R.J. p. 70). Picture three "*malades imaginaires*" hypocritically going to the vendor of quack medicines, one complaining of his stomach, another of a bad arm, and the third of a pain behind his ear, and inviting the aforesaid vendor to prescribe for them. Had he done so—diagnosed their symptoms—he would have fallen into the trap, for he would in that case, have been "convaincue d'y avoir pratiqué la médecine," within Article 3998 of the Revised Statutes of Quebec, and been liable to the penalty of $50, or in default, the imprisonment prescribed by the article. In a rather similar case in England (*Apothecaries Co.* v. *Nottingham*, 34 L.T. 76) of a chemist who was not a certified apothecary, the drug dispenser did fall a victim. Some customers came and asked him what was good for their ailments: he suggested medicine, made it up, and sold it to them; and it was held that in so doing he was acting and practising as an apothecary, and was liable to a penalty under the Apothecaries Act. The Quebec case turned on whether the vendor of the quack medicine had in fact diagnosed the ailments of the sham patients or not. They said he had; he said he had not. In this conflict of evidence the Court very properly was not disposed to let the evidence of persons who had been employed to get up a case, and who were to share the penalty when recovered, turn the scale. There is, *primâ facie*, a wide difference between selling and prescribing. A man in a free country like England or Canada may sell what he likes—quack medicines included. The sale of such medicines may do a certain amount of mischief, no doubt: so may the sale of intoxicating liquors or of trashy literature. But all medicinal virtue is not comprised in the British Pharmacopœia, nor has the State yet reached the socialistic ideal of grandmotherly care by prescribing to its citizens their proper physic.

Judicial Statistics and the Colonies.—The *Times*, in a leading article on the latest "Judicial Statistics" for England, has some remarks well worthy of attention:—"In reference to the Colonies," says the writer, "a suggestion may here be made. In recent years, thanks chiefly to the Home Office, the judicial statistics of England, Ireland, and Scotland have been assimilated. Why should not the same be done as to the Colonies? Many of their returns in their present forms are barely intelligible; and it is impossible, owing to the variety of methods adopted, to compare the figures for different Colonies. The Society of Comparative Legislation might do something to induce the Colonies to agree upon a uniform method of recording the facts of their legal systems." This suggestion is a good one, and will engage the attention of the Society. The larger the field from which statistics are drawn, the greater their value; but to widen the field without securing the trustworthiness of the data is merely to multiply the chances of error.

The Congress of Comparative Law at Paris.—The Society of Comparative Legislation having been cordially invited by the *Société de Législation Comparée* to send representatives to the Congress of Comparative Law at Paris, Sir Frederick Pollock, Mr. Montague Crackanthorpe, Dr. Schuster, and Mr. T. Barclay were appointed representatives of the Society at the Congress. The following letters from Professor Saleilles to Lord Russell will be read with interest:—

PARIS, 10 BIS, RUE DU PRÉ AUX CLERCS,
5. V. 1900.

MY LORD,—

La Société française de Législation Comparée vient de prendre l'initiative d'un Congrès de Droit Comparé qui se tiendra à Paris du 31 juillet au 4 août prochain.

Le but de ce Congrès ainsi que son programme vous seront indiqués par la circulaire publiée par le Comité du Congrès, et que je vous fais adresser.

Mais nous avons voulu, à l'égard de la Société dont vous êtes le Président, et qui poursuit le même but scientifique que la nôtre, ne pas nous contenter de cet envoi impersonnel, et je suis chargé par le Président de notre Congrès, M. George Picot, de l'Institut, et par le Comité d'organisation du Congrès, de vous adresser à vous personnellement, My Lord, et, par votre intermédiaire, à tous les membres de votre Société, l'invitation très pressante et très respectueuse de la Société française de Législation Comparée de Paris.

Le Congrès dont nous avons pris l'initiative aura d'abord pour premier objet de rapprocher tous ceux qui, dans la domaine de la science juridique, s'occupent de Législation Comparée, et tous ceux par conséquent qui veulent donner à cette comparaison des Legislations une place de plus en plus grande dans le développement de la science du droit.

Peut-être aura-t-il pour conséquence de provoquer d'autres Congrès internationaux similaires de la part des Sociétés étrangères analogues à la nôtre. C'est pourquoi, en dehors de toute autre préoccupation, notre Société a voulu, avant tout, que sa première invitation officiale fût pour la Société anglaise de Droit Comparé; et en dehors même du but scientifique et professionnel que je viens de vous exposer, vous voudrez bien voir là, My Lord, l'expression très sincère du sentiment de cordiale confraternité dont notre Société est arrivé vis-à-vis de la Société que vous représentez.

Notre Congrès fait œuvre de science exclusivement; et sur ce terrain peut-être aurions-nous la prétention de faire oublier très des malentendus que les passions politiques expliquent, sans toujours les excuser. C'est dans ce but surtout que, après avoir insisté sur l'œuvre scientifique que nous poursuivons et au nom de laquelle nous vous invitons, j'ai pris la liberté de laisser entrevoir les sentiments de haute et respectueuse sympathie dont notre démarche voudrait être la très sincère et très cordiale manifestation.

Il va de soi que les membres de la *Society of Comparative Legislation* qui

voudraient nous faire l'honneur de l'inscrire comme tels et à ce titre à notre Congrès seraient considérés comme nos invités, et n'auraient pas à payer la cotisation fixée par notre règlement.

Si vous désirez un certain nombre de nos circulaires pour communiquer aux membres de votre Société, je vous prierais de me faire dire le nombre qu'il y aurait à vous faire adresser.

Je vous prie doux, My Lord, de vouloir bien transmettre notre invitation à la Société dont vous êtes le Président, en lui demandant de vouloir bien nous envoyer quelques-uns de ses membres que la représentent.

Et je vous demande, My Lord, d'agréer l'expression de mes plus respectueux hommages.

R. Saleilles,

Professeur à la Faculté de Droit de l'Université de Paris.

Paris, 10 bis, Rue du Pré aux Clercs,
5. v. 1900.

Monsieur le Président,—

En vous remerciant du gracieux accueil que vous avez bien voulu faire à notre invitation, j'ai à m'excuser tout d'abord de ma mauvaise écriture et des difficultés dont elle a pu être cause. La réponse qu'elles nous ont value et si gracieusement adressée à notre Président nous a profondément touché. Je l'ai transmire à Monsieur George Picot, qui vous en dira lui-meme tous ses remerciements. En attendant, il m'a chargé de vous transmettre les renseignements que vous voulez bien nous demander. Et vous m'excuserez, cette fois encore, de passer par votre haute intermédiaire, n'ayant pas l'adresse du Secrétaire de votre Société.

Le Congrès de Droit Comparé qui doit s'ouvrir à Paris le 31 juillet, est organisé en effet par la Société française de Législation Comparée. La Société de Législation Comparée a été fondée à Paris en 1869 par Ed. Laboulaye, le grand publiciste bien connu ; elle compte actuellement près de 800 membres titulaires ou correspondants, dont un grand nombre d'étrangers. Pour l'Angleterre, en particulier, nous avons l'honneur de compter parmi nos membres, Sir Frédéric Pollock, Right Hon. J. B. Balfour, Sir Alfred Wills, J. Westlake, etc., etc.

Les ressources de la Société sont fournies exclusivement par le montant des cotisations payées par les membres de la Société, la cotisation étant de vingt francs par an ; nous ne recevons aucune subvention de l'Etat.

Les fonds de la Société sont consacrés à des traductions et publications de Lois Etrangères. Elle publie chaque année deux annuaires, l'un de deux à trois cents pages consacré aux Lois françaises parues dans l'annee, l'autre de plus de huit cents pages contenant toutes les principales Lois Etrangères de l'année traduites et annotées. En dehors de ces publications, la Société fait paraître au cours de l'année un Bulletin mensuel consacré au Compte rendu des Séances et réunions de la Société. Dans ces réunions, qui ont lieu

l'hiver à Paris au siège central de la Société, on discute au point de vue du droit comparé certaines questions d'actualité. Je me permettrai de vous faire adresser les différents Bulletins parus depuis le commencement de 1900. Dans celui du mois de janvier vous trouverez, avec le règlement de la Société, une liste complète des membres tout correspondants que titulaires. Pour ce qui est les annuaires il me serait assez difficile de vous faire cet envoi, *L'Annuaire de Législation étrangère* étant un volume considérable de plus de 800 pages: en ce moment le Secrétaire général de la Société, M. Daguin, étant absent, je ne pourrais prendre sur moi de disposer d'un exemplaire. Dès son retour, j'aviserai à ce que cet envoi puisse vous être fait.

Notre Société par ses publications a propagé, non seulement en France, mais dans toutes les universités d'Europe, la connaissance des principales lois étrangères; c'est ainsi que nous avons traduit et publié toutes les lois anglaises les plus importantes de ces trente dernières années, et que par là elles ont pénétré dans les pays dont la langue se rattache à la nôtre, tels que l'Italie et l'Espagne, où nos collections sont très répandues.

Cette année, la Société de Législation Comparée a pensé qu'il pourrait être utile de provoquer un véritable Congrès de Droit Comparé, dans lequel on pût discuter entre savants et juristes des differents pays la fonction même le rôle du Droit Comparé pour le développement et le progrès de la science du droit prise dans sa généralité. C'est à ce Congrès, Monsieur le Président, que nous avons eu l'honneur de vous convier, en vous adressant à vous-même notre invitation personnelle, et en y joignant notre invitation collective pour la Société que vous présider.

Je vais d'ailleurs vous faire adresser une vingtaine de nos programmes.

Aucun honneur ne pourrait nous être plus sensible que vous nous feriez en répondant à notre appel.

Veuillez, Monsieur le Président, recevoir l'expression renouvelée de mes plus respectueux hommages.

R. Saleilles,

Professeur à la Faculte de Droit en Universite de Paris.

Printed by Hazell, Watson, & Viney, Ld., London and Aylesbury.

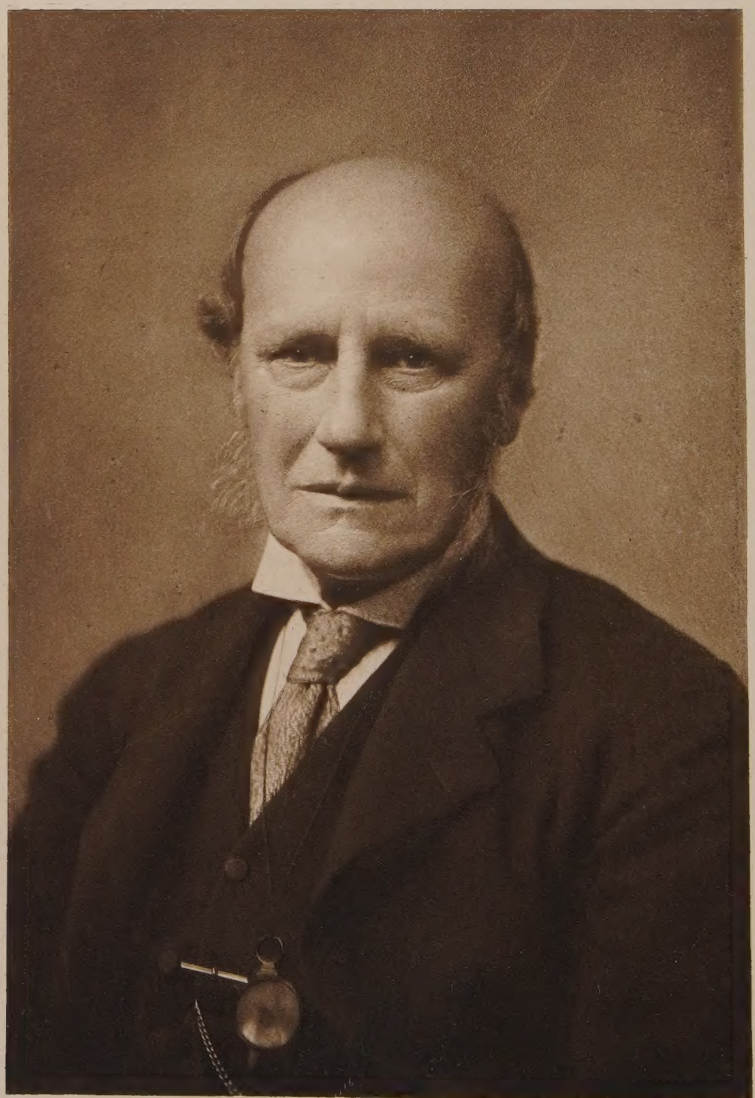

Photo. Elliott & Fry.

The Rt. Hon. Lord Davey, Lord of Appeal.

Chairman of the Executive Committee of the Society.